

The War against Terror

Self-Defence, 11 September 2001 and Beyond

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1 Introduction

1.1 The Problem

Following the incident 11 September 2001, the United States claimed to act in self-defence in Afghanistan. One condition of self-defence will be analysed in the thesis, namely whether there was an “armed attack” 11 September 2001 pursuant to the UN Charter Art 51. The focus will be on *who* have the legal capacity to carry out such an attack, and under which circumstances.

The incident 11 September 2001 (hereinafter “the 11 September incident”) is possibly the result of a so-called asymmetric threat. There may be several aspects of asymmetry, but for the purpose of the thesis, the interesting part is the state element, or lack of such, since the author is a non-state actor, identified as Al Qaida. The term “non-state actor” is given a broad meaning, so that it covers any group of individuals that lacks legal personality *unless* it acts on behalf of a state.¹ This potential asymmetry challenges the condition of armed attack.

In the analysis of this aspect of armed attack, a distinction ought to be drawn between conduct *by* a state and conduct *from* a state.² Conduct by a state qualifies undoubtedly as armed attack,³ whereas this is less clear regarding from a state, even where a state supports the actual conduct. In legal theory this aspect of armed attack is not always clearly dealt with,⁴ if it is dealt with at all. A useful point of departure is provided by Cassese (1989),⁵ who presents six categories to describe different relationships between

¹ Compare the definition by the ILC in its Report (2001, p. 109).

² Compare Dinstein (2001, p. 192).

³ But only if the scale and effect are sufficient and if the conduct is directed against a state (compare section 1.1.1).

⁴ Compare Ulfstein (2003, p. 159, with further references in note 18).

⁵ Pp. 597-600.

states and non-state actors, with the purpose of defining armed attack. Two categories relate to conduct by state officials or *de facto* state agents, in other words conduct by a state. The remaining four categories are relevant for conduct merely from a state: Three categories relate to different forms of support to non-state actors, both active and passive support, which constitute a “grey zone” of armed attack, whereas the latter category includes situations of no state support at all.

There are hence two major problems to be discussed in the thesis, firstly whether the 11 September incident is conduct on behalf of Afghanistan, hence being an armed attack. Provided there is no such state conduct, the problem arises whether any form of support, active or passive, by Afghanistan to Al Qaida implicates an armed attack 11 September 2001. Although the discussion will be closely connected to Afghanistan, Al Qaida and 11 September 2001, the intention is also to present a more general phramework on who have the legal capacity to carry out an armed attack, and under which circumstances. But the 11 September incident is the clear point of departure.

Hence the topic of the thesis is closely connected to the “war against terror” proclaimed in the aftermath of 11 September 2001.⁶ But neither the terms of “war” or “terror” are legally significant for the main problem in focus: The so-called war against terror should be understood in the same way as a “war against drugs” or a “war against poverty”. Under any circumstances, the existence of an armed attack does not depend on any situation of war, neither formally or factually.⁷ Neither are the terms of “terror” or similar terms relevant;⁸ it is the non-state actor element that makes the discussion interesting for self-defence, not whether violent incidents constitute “terror acts”.

1.1.1 Other Aspects of Armed Attack

The state aspect of armed attack is the main problem discussed in the thesis. Two other aspects of armed attack do not create any major problems in relation to the 11 September incident, namely whether its extent was sufficient and whether it was

⁶ Cf. *e.g.* Address to Congress by the President of the United States (20 September 2001).

⁷ For the contrary view, cf. Dinstein (2001, pp. 192-213).

⁸ With a possible exception for *some* legal significance in relation to acquiescence based on the Definition of Aggression (1974), annexed to General Assembly resolution 3314 (XXIX) (1974).

directed against the United States as such. A few comments are nevertheless appropriate:

As regards the extent of the incident, the prevailing view in legal theory is that use of force does not necessarily qualify as armed attack, even if it is prohibited according to the prohibition of use of force pursuant to the UN Charter Art 2 (4).⁹ The term “armed attack” does not reveal whether its content differs from “use of force”. Taking into consideration Art 2 (4), forming a relevant context for the interpretation of Art 51, an assumption is that if low-scale use of force were excluded from armed attack, escalation of conflicts *could* easier be avoided. Such an effect is consistent with Art 2 (4) in the seeking of the fundamental purpose of international peace and security of the UN Charter. On the other hand, also in such situation there may be a need of self-defence, and in that sense an exclusion of armed attack could be contrary to the purpose of Art 51.

Furthermore, in the *Nicaragua* case, the International Court of Justice (hereinafter “the ICJ”) stated that the relevant conduct must contain certain “scale and effects”, and assumed that *e.g.* mere border incidents were not covered by the condition of armed attack.¹⁰ Some reservations ought to be attached to the statement, *e.g.* it has been criticised for being baffling.¹¹ But self-defence was one of the main issues of the *Nicaragua* case, and such a judgement by the ICJ is a forceful argument to conclude that not all use of force constitute armed attack.¹²

Traditionally, one of the problems by applying “armed attack” on so-called terror acts has been lack of sufficient scale and effects of the incidents. With the killings of

⁹ And the prevailing interpretation of Art 2 (4) is that all use of military force between states is prohibited, cf. Commentary to the Charter (2002, p. 119).

¹⁰ P. 103, para. 195.

¹¹ Dinstein (2001, p. 175).

¹² The conclusion is consistent with *e.g.* Commentary to the Charter (2002, p. 796, compare pp. 790-792), stating that “the notion of ‘armed attack’ has a narrower meaning than the phrase ‘use or threat of force’ within the meaning of Art. 2 (4)”.

approximately 3000 people, coupled with severe economical damage, the 11 September incident clearly contains the scale and effects required to be an armed attack.¹³

The wording of Art 51 requires that the armed attack must be directed against a state, and a reasonable interpretation is that the target must be the state as such. With respect to the 11 September incident the answer is clear as regards the event related to the Pentagon, containing the Department of Defence. It is less clear related to the other events. The World Trade Center can however be viewed as a symbol of the financial strength of the United States and maybe even as a symbol in general of the United States and its powers. In this perspective it is reasonable to interpret all these events of 11 September 2001 as directed against the United States as such.

1.1.2 Related Aspects of International Law

The intention is to focus on an important question of self-defence that *particularly* arises in relation to violent incidents, sometimes characterised as “terror acts”, by non-state actors, as illustrated by the 11 September incident. Several other questions of self-defence arise in such situations, but will not be pursued in the thesis:

These include *inter alia* whether an armed response is a reprisal or self-defence, which can also be viewed as a question of the duration of the armed attack. Questions also arise whether armed action complies with requirements of customary international law, both whether it is necessary and proportionate. In relation to Afghanistan, these requirements imply questions of whether the armed action in Afghanistan was the last resort, and whether the targeting of the Taleban and the duration of the military operation was proportionate.

Moreover, self-defence is the only legal basis for use of force between states under discussion. Hence there will be no focus on any possible authorisation by the Security Council of the armed operation in Afghanistan pursuant to the UN Charter

¹³ Ulfstein (2003, pp. 157-158) in the same direction. As regards the factual elements in general, cf. the United States Government Report on 11 September 2001 (15 August 2002), and regarding the estimated economical damage, cf. Wesbury, Brian S. (2002).

Chapter VII,¹⁴ nor on other possible legal bases for use of force. And problems related to limits for use of force derived from international humanitarian law and international criminal law will not be addressed. Neither will there be focus on consequences of illegal use of force, including state responsibility and international criminal law.

1.2 Methodological Questions

The problems discussed in the thesis arise some *particular* methodological questions that will be presented below.

1.2.1 Legal Basis

1.2.1.1 The UN Charter

The approach of the thesis is to interpret a treaty provision, namely the UN Charter Art 51 and its term “armed attack” in particular. The method of international law establishes principles on the interpretation of such a treaty provision, and in particular the principles of the Vienna Convention Art 31 to 33 are relevant. Truly this convention of 1969 has no retroactive effect, but at least its Art 31 is regarded to reflect customary international law.¹⁵ Expressing the essence of treaty interpretation, it is a fair assumption that the content of the customary rule was quite similar in 1945, at the entry into force of the UN Charter. Moreover, the general method of international law, partly expressed by the Statute of the International Court of Justice (1945) Art 38, contains relevant principles for the interpretation of the UN Charter Art 51.

The ordinary meaning of the terms of a treaty provision is the important point of departure for interpretation in compliance with the principle of the Vienna Convention Art 31. The question is whether a more flexible way of interpretation of the UN Charter is called for. An argument in legal theory is that being the constitutional document of an international organisation, the UN Charter “is being used in order to accomplish the stated aims of that organisation”¹⁶. In other words, if the interpretation relies too heavily on the ordinary meaning of the terms it might hinder the aims of the United Nations

¹⁴ This aspect is discussed by *e.g.* Ulfstein (2001, pp. 154-157).

¹⁵ Shaw (1997, p. 656, with further references in note 117).

¹⁶ Shaw (1997 pp. 658 and 659).

being realised. But the argument is dangerous, since the ordinary meaning reflects the agreement of the parties to the treaty, containing the reason for emphasising the terms of the treaty in their ordinary meaning. A general approach allowing a more flexible interpretation of the UN Charter than treaties in general should therefore not be accepted. Another issue is that other arguments of interpretation may be so strong that the ordinary meaning is not decisive.

Although the question of flexible interpretation is relevant for parts of the thesis, it is not decisive in relation to the main problem, namely *who* can carry out an armed attack, and under which circumstances. The term of “armed attack” pursuant to Art 51 does not solve that problem, so the question will remain first and foremost on other sources than the ordinary meaning of that term.

1.2.1.2 State Practice

In general, state practice is a relevant mean for the interpretation of treaties according to the Vienna Convention Art 31 (3) (b). Not only the treaties by themselves are a source of establishing the will of states, but also state practice may be such a source. Therefore it is reasonable to emphasise state practice to interpret treaties. The problem is however whether an added emphasis is justified for the purpose of interpreting the UN Charter.

Although factual developments may create needs to change the UN Charter, such changes may in practical terms be difficult to make. In their practice states may take such factual developments into consideration, which may be important for the achievement of the goals of the United Nations. These needs may be higher for treaties being constitutional documents than other treaties. On the other hand, to overemphasise state practice contains the danger of reducing the value of the ordinary meaning of the terms of the treaty, which remain important for treaty interpretation as discussed above. Hence it should not be justified with an *added* emphasis of state practice for the purpose of interpretation of the UN Charter and its Art 51.

1.2.1.3 General Assembly Resolutions

There are General Assembly resolutions of interest for the problems discussed in the thesis, *e.g.* the Declaration of Friendly Relations (1970) on the question of acquiescence in relation to terror acts abroad. The problem is whether such resolutions are relevant for the interpretation of the UN Charter, and which emphasis ought to be attached to them. Two main approaches are used in this respect, by either emphasising the practice of the treaty organ as such, or as an argument of state practice.

As regards the first approach, it is not clear that practice by a treaty organ such as the General Assembly is a relevant source according to the Vienna Convention Art 31 (3) (b). The provision requires that the practice establishes “the agreement of the parties”, and not merely the will of a treaty organ. This is consistent with the starting point of interpretation being the ordinary meaning of the terms of a treaty. Furthermore, the resolutions by the General Assembly do not have any legally binding effect,¹⁷ and the principal judicial body of the United Nations is the International Court of Justice,¹⁸ not the General Assembly. On the other hand, the General Assembly is a body constituted by the UN Charter itself, in order to reach the aims of the organisation.¹⁹ All member states have a right to vote on the resolutions, and consensus resolutions, or resolutions with almost consensus, might be close to establish the “agreement of the parties” to the UN Charter. In such situations it seems justified not only to use General Assembly resolutions for the purpose of interpretation,²⁰ but also with certain emphasis, although the emphasis in general should not be exaggerated.

In practical terms the approach contains interest first and foremost in relation to resolutions of a general nature, linked to international law. One example is the already mentioned Declaration of Friendly Relations (1970),²¹ which deals with basic principles of international law.

¹⁷ Except resolutions on *inter alia* financial matters, cf. the UN Charter Art 17.

¹⁸ The UN Charter Art 92.

¹⁹ Compare Shaw (1997 pp. 658 and 659).

²⁰ Compare *e.g.* Ruud and Ulfstein (2002, p. 53).

²¹ Compare Brownlie (1998, p. 15, note 86).

Since the “agreement of the parties” is the essential argument for that conclusion, such resolutions could as well be characterised as sources of state practice, which clearly is a relevant source for treaty interpretation. A similar approach was used by the ICJ in the *Nicaragua* case in relation to the customary prohibition of use of force between states.²² As an argument to establish that custom, the ICJ emphasised the attitudes of states towards the Declaration of Friendly Relations (1970), as expressed by their voting in the General Assembly. It is not doubtful that the ICJ would have used a similar approach were the basis of the discussion the treaty provision of Art 2 (4). The danger is that the approach could undermine the rule that General Assembly resolutions do not have any legally binding effect. Nevertheless, the General Assembly is unique in the sense that practically all states in the world have a right to speak and vote. Consensus resolutions, or resolutions with almost consensus, can therefore be a valuable source of state practice. The emphasis ought to be somewhat limited; the approach ought to be done with “all due caution”.²³

There is a clear similarity between the two approaches above: The impact on the interpretation of the UN Charter depends on the attitudes by states towards the resolutions, as expressed by their voting in the General Assembly. Therefore there will be no further attempts in the thesis to distinguish between these approaches.

1.2.1.4 Security Council Resolutions

Furthermore, there are resolutions of interest by the Security Council as well, *e.g.* on the practice of Israel and in the aftermath of 11 September 2001. The problem is whether such resolutions are relevant for the interpretation of the UN Charter, and which emphasis ought to be attached to them. A distinction will be drawn between the impacts as such and in relation to state practice.

As regards the impact by the practice by the treaty organ as such, there are differences to the discussion on the practice by the General Assembly. Importantly, far from all

²² Pp. 99-100, para. 188.

²³ Ibid.

member states have a right to vote on the Security Council resolutions, hence it is difficult to establish any “agreement of the parties” according to the Vienna Convention Art 31 (3) (b). On the other hand, the Security Council has the primary responsibility in relation to the fundamental purpose of the United Nations of international peace and security. Furthermore, its resolutions may contain a legally binding effect. Both arguments imply that certain emphasis is justified in relation to the interpretation of the UN Charter. *E.g.* the Security Council made statements on self-defence in its resolutions 1368 (2001) and 1373 (2001) in the aftermath of 11 September 2001, which seem to be relevant factors to interpret Art 51.²⁴

Since most states do not vote on Security Council resolutions, the value as source of state practice seems decreased compared to the General Assembly resolutions. On the other hand, the mere existence of Security Council resolutions on international peace and security might be an argument *in relation to* state practice. A difficult problem of state practice is the role of lack of protests by numerous states in face of practice followed by some others, and an interesting question is whether Security Council resolutions on international peace and security may constitute an appeal for states to explicitly protest against such practice to avoid acquiescence in that practice.

The relevance and emphasis of Security Council resolutions will be further addressed in chapter 3 (section 3.3.4).

1.2.1.5 The International Law Commission

There are also some work of the International Law Commission (hereinafter “the ILC”) of interest, in particular its Report on State Responsibility (2001). This work can be viewed as legal theory relevant for the purpose of treaty interpretation.²⁵ The problem is however whether an *added* emphasis is justified due to the fact that the ILC is the author.

²⁴ Compare Ulfstein (2003, p. 157).

²⁵ On the relevance of legal theory, cf. section 1.2.1.6.

One approach is to ask whether the practice by the ILC is practice according to the Vienna Convention Art 31 (3) (b). The situation is different compared to the practice of the General Assembly and the Security Council: The ILC does not consist of member states, but by legal scholars, and it is not a treaty organ of the UN Charter, but an organ constituted by the General Assembly.²⁶ Hence it is difficult to establish any “agreement between the parties” according to Art 31 (3) (b).

But since the ILC is not only constituted by the General Assembly, but also has a formal relationship to it, certain added emphasis may be justified although it does not fulfil the requirements of Art 31 (3) (b). Moreover the ILC is a body that consists of broad number excellent legal scholars from various member states of the United Nations, which factually can lead to high quality reports and statements on legal matters. In particular an additional emphasis may be justified as to consensus reports by the ILC. Hence the work by the ILC also contains a potential for increased *factual* emphasis compared to the works of legal scholars in general.

For the purpose of the thesis it will be particularly interesting to assess the value of the work of the ILC in the field of state responsibility, and to which degree it reflects customary international law.²⁷ In this analysis attention must be paid to the fact the intention of the ILC is not only to make codifications of customary international law, but also to “promote the progressive development of international law”²⁸. Hence it should not be taken for given that its work necessarily reflects customary international law, but to consider the question in light of the relevant legal material and the view of the ILC on the issue itself.

²⁶ The General Assembly resolutions 94 (I) (1947) and 174 (II) (1947), cf. the UN Charter Art 13, no. 1, litra a.

²⁷ Which is clearly a relevant source for the interpretation of the UN Charter Art 51, cf. the principle of the Vienna Convention Art 31 (3) (c).

²⁸ Compare the UN Charter Art 13, no. 1, litra a.

1.2.1.6 Legal Theory

Legal theory is clearly a relevant source for interpretation of the UN Charter Art 51. Truly legal theory is not explicitly referred to by the Vienna Convention, but its Art 32 states that there are “supplementary means of interpretation, *including ...*” (italics supplied), a wording that opens for other sources as well. The relevance of legal theory is also consistent with the general method of international law and the Statute of the International Court of Justice (1945) Art 38, no. 4. And legal theory is undoubtedly applied by the ICJ and other international tribunals for the purpose of treaty interpretation.

However in legal theory the topic of the thesis is not always discussed in much detail. Moreover, as pointed out by Ulfstein (2003)²⁹, the question of non-state actors and armed attack is not always *clearly* dealt with in legal theory. Cassese (1989, pp. 597-600) constitutes an example of a clear presentation, and has influenced the approach of the thesis, in addition to in particular the works by Dinstein (2001, pp. 192-221) and Ulfstein (2003, pp. 157-161).

1.2.2 Factual Basis

Several factual questions arise in the thesis, including who were the perpetrators of the 11 September incident, whether they were members of Al Qaida, what Al Qaida is, and which relationship there was between the Taleban and Al Qaida in Afghanistan.

The main focus of the thesis is not to analyse these factual aspects in details, but clearly some information is required. Legal theory contains references, such as Ulfstein (2003) and Greenwood (2002), in addition to works by other scholars such as Harpvigen and Strand (2001), Hegghammer (2002) and Fouda (2002), and governmental reports, *e.g.* the British Intelligence Report (4 October 2001). There is lack of credible and reliable information to some of the questions, and some sound scepticism ought to be attached to some of the sources. These problems will be further addressed below.

²⁹ P. 159, with further references in note 18.

1.3 Outline

The distinction between conduct by a state and conduct from a state is reflected by the two main chapters of the thesis:

Chapter 2 analyses whether the 11 September incident is conduct on behalf of Afghanistan, based on customary rules of state responsibility. The work of the International Law Commission may be an important source to establish these customary rules. Among other questions arising is whether the incident was controlled by Afghanistan and therefore conduct on behalf of that state.

Chapter 3 discusses whether any form of support by Afghanistan, active or passive, to Al Qaida implicates an armed attack 11 September 2001. The purpose of self-defence forms an important starting point for the discussion, and subsequently active and passive support will be respectively analysed. The questions include whether there is any “substantial involvement” according to the Definition of Aggression (1974), annexed to the General Assembly Resolution 3314 (XXIX) (1974), as referred to by the ICJ in the *Nicaragua* case, and which arguments may be deduced from state practice and Security Council resolutions, in particular in the aftermath of 11 September 2001.

The main conclusions will be presented in chapter 4.

2 Conduct on Behalf of Afghanistan

The problem is whether the 11 September incident is conduct on behalf of Afghanistan and hence also an armed attack pursuant to the UN Charter Art 51, and the approach will be to analyse relevant customary rules of state responsibility. Whereas the conduct of *de jure* state organs is the problem of the first section below, the subsequent sections will discuss the possibility for *de facto* conduct on behalf of Afghanistan.

The work of the International Law Commission may be an important point of departure to establish the customary rules of state responsibility relevant for conduct on behalf of states.³⁰ The ILC has worked in the field of state responsibility since 1949, and its work includes extensive studies by five Special Rapporteurs, the first drafting of the articles on state responsibility (1980/1996) with the comments by states thereon, and the second, final drafting of the articles 9 August 2001.³¹ The ILC recommends here that the General Assembly takes note of the Draft (2001) and annexes the articles to a resolution, and that the General Assembly on a later stage consider to held a conference for the purpose of concluding a convention on the topic.³² The General Assembly took note of the ILC Draft (2001) in its resolution 56/83 (2001).

As outlined in section 1.2.1.5 there are good reasons to emphasis the work of the ILC in this field. However to reach firm conclusions, the questions needs to be analysed in relation to other legal source, including those referred to by the ILC itself.

³⁰ Customary law is relevant for the interpretation of Art 51 according to the principles of the Vienna Convention Art 31 (3) (c).

³¹ The ILC Report (2001, pp. 29-32).

³² Ibid, p. 42.

2.1 *De Jure* State Organ

In its Draft (2001), the ILC outlines a definition of state organs in Art 4 (1), which includes organs that exercise “legislative, executive, judicial or any other functions”. The classification of state organs must be based on *inter alia* internal law according to Art 4 (2) which to the view of the ILC also includes the internal practice of the state.³³

The problem is firstly whether this provision reflects customary international law. In relation to Art 4 (1), the ILC refers to extensive legal material to support the provision,³⁴ and it is quite convincing in relation to custom. Furthermore, there is hardly any reason to doubt that the internal law of the state is a relevant source for the classification of state organs according to Art 4 (2). As regards internal practice, in some national systems practice is a source of law itself, but even if it is not, a reason to include it is convincing: A formal requirement of law can be misleading³⁵ and hence undermine the effectiveness of the rules of state responsibility.

The question of whether Al Qaida was a *de jure* state organ of Afghanistan depends *inter alia* on the content of “internal practice” of the state. Merely a few examples are given by the ILC, which mentions other state organs then the cabinet of the state or the police where it has a special status.³⁶ Gaja (2001) argues that “a formally independent terrorist group could be part of the organization of a state”, with reference to the ILC Draft (2001), Art 4 (2). To his opinion, such a group could be covered if *e.g.* its objectives were to fight foreign governments. The author is not explicit on why this is a reason to include Al Qaida as a state organ. Truly the objectives and functions can be covered by the broad definition of state organs of Art 4 (1). But the problem remains whether the non-state actor is founded in the “internal practice” of Afghanistan.

For this problem, it must be clarified which constituted the government of Afghanistan. Truly the Northern Alliance still represented the state in the General Assembly of the

³³ Ibid., pp. 90-91.

³⁴ Ibid., pp. 84-90.

³⁵ Ibid., p. 90.

³⁶ Ibid., pp 90-91.

United Nations, and the Taleban was merely recognised by a few states. Nevertheless the Taleban controlled approximately 90 % of the territory of Afghanistan. Hence the Taleban constituted the government and regime of the state, and the question is whether any practice by the Taleban established Al Qaida as a *de jure* state organ.

The factual relationship between the Taleban and Al Qaida is not clear.³⁷ According to the British Intelligence Report (4 October 2001) Al Qaida supported the Taleban regime with arms and finances, whereas Al Qaida in return could operate freely on the territory controlled by the Taleban. The report does not reveal its source of information, but the assumption of lack of interference by the Taleban seems well established.³⁸ It seems doubtful whether lack of interference is sufficient to be any “internal practice” by the Taleban, all the more since this is hardly consistent with the examples provided by the ILC on *de jure* state organs.

Hence Al Qaida was not a *de jure* state organ of Afghanistan according to the customary international law reflected in the ILC Draft (2001), Art 4.

A problem arises if Al Qaida nevertheless were considered a *de jure* state organ of Afghanistan, namely whether the 11 September incident was conduct by this state organ. According to the ILC there is no distinction between “the acts of ‘superior’ and ‘subordinate’ officials” of the state organ.³⁹ Factually the evidence imply that the perpetrators of the 11 September incident had a connection to Al Qaida in Afghanistan,⁴⁰ but were they “subordinates” of the *de jure* state organ of Al Qaida? The structure of Al Qaida is special: It consisted of a hierarchical organisation based in Afghanistan, and a “network” in several states.⁴¹ The organisation in Afghanistan

³⁷ E.g. Harpvigen and Strand (2001, p. 470).

³⁸ The lack of action is also reflected by Security Council resolution 1333 (2000), stating a “failure ... to respond” to the previous Security Council demands of action by the Taleban, in relation to *inter alia* bases.

³⁹ The ILC Report (2001, p. 87).

⁴⁰ Cf. e.g. Fouda, Yosri (2002).

⁴¹ Hegghammer (2002).

provided trainings, finances and other support for its network,⁴² which consisted of both individuals (“cells”) and other groups.⁴³ The term of “subordinate officials” is not designed for such structures. On the other hand, by accepting Al Qaida as a *de jure* state organ, it also seems difficult to clearly distinguish between the organisation in Afghanistan and the part of its network consisting of individuals. Hence it is reasonable to view the perpetrators of the 11 September incident as “subordinate officials”.

Hence given that Al Qaida was a *de jure* state organ of Afghanistan, which the organisation was not, the 11 September incident constituted conduct of that organ in accordance with the ILC Draft (2001), Art 4.

2.2 De Facto Control

A state is not only responsible for conduct by its *de jure* state organs, but also for conduct *de facto* on its behalf. The main problem to be discussed in this section is whether the conduct by Al Qaida was *de facto* on behalf of Afghanistan, based on *de facto* control by the state of that conduct. Control as a requirement will be analysed in light of the work by the ILC, in particular the Draft (2001), Art 8, the *Nicaragua* case by the ICJ and the *Tadic* case by the ICTY. The ILC Draft also contains terms of “direction” and “instruction”, and the implication thereof will be discussed at the end of the section.

Quite clearly there exists a customary condition of “control” for the purpose of establishing conduct on behalf of a state. Two international judgements are referred to by the ILC in this respect: In the *Nicaragua* case the ICJ applied a condition of “effective control”,⁴⁴ and the ICTY referred to a condition of “overall control”, although in another context.⁴⁵ So the existence of such a requirement is not the controversial point to establish conduct on behalf of states.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ The *Nicaragua* case, pp. 64-65, para. 115.

⁴⁵ The *Tadic* case, para. 145.

The problem is therefore whether the 11 September incident was controlled by the Taliban, which relies on an interpretation of the term of control. Although this is not a question of treaty interpretation relying on the principles of the Vienna Convention Art 31, the ordinary meaning forms a starting point for the interpretation of the term. The *New Oxford Dictionary of English* (1998) defines the term as “the power to influence or direct people’s behaviour or the course of events”.

In its Report (2001), the ILC refers to the *Nicaragua* case with respect to the relationship between the United States and the *Contras* group within Nicaragua.⁴⁶ The ICJ discussed whether the United States were responsible for alleged violations by international humanitarian law and human rights based on conduct by the *Contras*, taking into account support from the United States to the *Contras* in forms of weapons, finances, trainings, logistics and other support. The requirement of “effective control” was not met, since the ICJ stated that these forms of participation, even coupled with “general control by the respondent State over a force with a high degree of dependency on it”, would not suffice.⁴⁷ Consistent with the *Nicaragua* case⁴⁸, the ILC states:

“Such conduct will be attributable to the State only if it directed or controlled *the specific operation* and the conduct ... was an *integral part* of that operation.”⁴⁹

According to this interpretation, mere influence according to the ordinary meaning of the term is not sufficient.⁵⁰

The *Tadic* case contrasts the *Nicaragua* case. Here, the ICTY discussed whether there was an international armed conflict so that the international humanitarian law was applicable.⁵¹ The specific question was whether the conduct of the Bosnian Serb Army was controlled by the Army of the Federal Republic of Yugoslavia (Serbia and

⁴⁶ ILC Report (2001, p. 105).

⁴⁷ The *Nicaragua* case, p. 64, para. 115.

⁴⁸ Ibid.

⁴⁹ The ILC Report (2001, p. 104), italics supplied.

⁵⁰ The ILC Report (2001, p. 164).

⁵¹ The *Tadic* case, para. 80 and 84.

Montenegro).⁵² According to the ICTY, as regards an “organised and hierarchically structured group”⁵³, the relevant requirement is

“*overall control* going beyond the mere financing and equipping of [armed] forces and involving also participation in the planning and supervision of military operations”.⁵⁴

Contrary to the *Nicaragua* case, it is not required that “such control should extend to the issuance of specific orders or instructions relating to single military actions”⁵⁵.

The problem is which of these interpretations, “effective” or “overall”, are relevant for the content of control. The ILC points out that the discussion by the ICTY relates to the application of international humanitarian law, with the final purpose of establishing individual criminal responsibility, and that it does not relate to the consideration of state responsibility as such.⁵⁶ In contrast, state responsibility was one of the main questions evaluated by the ICJ, constituting an argument in favour of the interpretation presented in the *Nicaragua* case. Moreover a judgement by the ICJ is in general regarded to contain more weight than judgements by other international tribunals. A factor is also that the ILC shares the view of the ICJ in the *Nicaragua* case.⁵⁷

But there are some factors decreasing the weight of the *Nicaragua* case: It led to no consensus judgement. And there could have been more extensive legal analysis of the establishment of the effective control test, all the more since there may be difficulties to prove the specific control in accordance with the *Nicaragua* case. These problems of proof can, to the view of the ICJ, prevent the effectiveness of the rules of state responsibility. On the other hand, a relatively low threshold could lead to abuse of these rules. And the factors decreasing the weight of the *Nicaragua* case should not be exaggerated.

⁵² Ibid., para. 147.

⁵³ Ibid., para. 120.

⁵⁴ Ibid., para. 145, italics in original.

⁵⁵ Ibid.

⁵⁶ The ILC Report (2001, pp. 106-107).

⁵⁷ ILC Report (2001, pp. 106-107).

Therefore the interpretation of the ICJ in the *Nicaragua* case is decisive, so that the relevant requirement is “effective” control to establish *de facto* control and hence also conduct on behalf of a state.

As regards the Taleban, there are no clear indications of involvement beyond the lack of interference in the conduct by Al Qaida on its territory. Hence there was no effective control by the Taleban of Al Qaida in carrying out the 11 September incident, as required by the ILC Draft (2001), Art 8 and the *Nicaragua* case.⁵⁸

The ILC Draft (2001), Art 8 contains also two other terms potentially relevant to establish conduct *de facto* on behalf of a state, namely *de facto* “direction” or “instructions” of that state. The first problem is whether these terms are consistent with customary international law. Instructions as a condition follows according to the ILC from international jurisprudence, although the cases referred to were decided before 1940.⁵⁹ The condition of direction relates to a passage of the *Nicaragua* case,⁶⁰ but with less discussion than effective control. There are some doubts, since the firstly mentioned cases are old, and since there is lack of legal analysis in the latter case. Such conditions may be accepted as customary international law, but the conclusion is far from as strong as regarding the effective control test. The problem in focus is however whether these requirements contribute anything beyond the condition of control discussed above.

It is noteworthy that the ordinary meaning of control referred to previously in section included “the power to ... *direct*” (italics supplied) and in that sense is a synonymous term to direction. Although the legal content of the condition of control is narrower than the ordinary meaning, by requiring it ought to be effective, an essential part of control remains an “actual direction of an operative kind” according to the ILC.⁶¹ The line

⁵⁸ Similar conclusion by Ulfstein (2003, p. 160).

⁵⁹ The ILC Report (2001, p. 104, cf. note 161).

⁶⁰ Ibid, p. 105, cf. note 163.

⁶¹ The ILC Report (2001, p. 164), a passage referred to by the ILC on p. 104, note 160.

between the terms of control and direction is therefore ambiguous, if there is any line at all. The application of “direction” in the *Nicaragua* case does not clarify the issue.

Regarding the possible condition of “instructions” it is defined as “*direction* or order” (italics supplied) by to the *New Oxford Dictionary of English (1998)*. It is difficult to understand the difference to “direction” in the ordinary meaning of the term of instructions. The comments by the ILC hardly clarify the potential difference between the terms.

Also to the view of the ILC, a common feature by the three conditions of *de facto* control, direction and instructions is *de facto* authorisation of the conduct by the non-state actor.⁶² But which differences there are between the terms is ambiguous, and the attempts to distinguish between them are not fully convincing. Concretely, if a non-state actor is either instructed or directed by a state, *and* carries out the actual conduct, it is hardly meaningful that the conduct happens if the state lacks effective control of the non-state actor and its conduct.

Hence the key of Art 8 is the condition of “control”, whereas it is doubtful whether there are any independent conditions of “instructions” and “direction”. Accordingly the conclusion remains that there is no conduct *de facto* on behalf of Afghanistan based on the ILC Draft (2001), Art 8.

2.3 Adoption and Acknowledgement

According to the ILC Draft (2001), Art 11 another basis of *de facto* conduct on behalf is adoption and acknowledgement of conduct. This condition is based particularly on the view of the ICJ in the *Tehran* case,⁶³ and where the opinion of the ILC is consistent with the ICJ it is a fair assumption that the customary rules of state responsibility are reflected.

⁶² Compare the ILC Report (2001, p. 108), stating that “[w]here a State has authorized an act, or has exercised direction or control over it, questions can arise as to the State’s responsibility for actions going beyond the scope of the authorization.”

⁶³ ILC Report (2001, p. 120).

In the *Tehran* case, the ICJ discussed whether seizure by militants of the embassy of the United States was conduct on behalf of the Iranian state. Based on a decree of the Iranian state expressly approving and maintaining the situation, accompanied with repeated statements in various contexts, the ICJ identified conduct on behalf of Iran.⁶⁴ And according to the ILC mere support or endorsement is insufficient:

“[W]hat is required is something more than a *general* acknowledgement of a factual situation, but rather that the State identifies the conduct in question as its own”.⁶⁵

The *Tehran* case was based on statements concretely connected to the conduct under question, which seems consistent with the view of the ILC, which states that what is required is “clear and unequivocal” acknowledgement and adoption.⁶⁶ In addition to interpretation of words, as in the *Tehran* case, the ILC assumes that acknowledgement and adoption can be inferred from conduct of state organs as well.⁶⁷

An important question is whether acknowledgement and adoption have retroactive effect. The question did not arise in the *Tehran* case, since the Iranian state acquired responsibility upfront the relevant statements based on its failure to take sufficient action to prevent the seizure and bring it to an immediate end.⁶⁸ The ILC states that the Draft (2001), Art 11 has retroactive effect⁶⁹, but it is not clear whether this follows from established customary international law.

There are no indications that the Taleban explicitly stated any support at all to the 11 September incident and under no circumstance any acknowledgement or adoption in accordance with the ILC Draft (2001), Art 11. Hence there was no conduct 11 September 2001 on behalf of Afghanistan on this basis.

⁶⁴ The *Tehran* case, p. 35, para. 74.

⁶⁵ ILC Report (2001, p. 121), italics supplied.

⁶⁶ ILC Report (2001, p. 122).

⁶⁷ Ibid.

⁶⁸ The *Tehran* case, pp. 31-33, para. 63-68.

⁶⁹ ILC Report (2001, p. 120).

2.4 Other Legal Bases

Other bases of *de facto* conduct on behalf of a state are presented by the ILC in its Draft (2001), Art 9 and 10. Only a few comments are made on the content of these *potential* conditions of customary rules of state responsibility:

As regards Art 9, the problem is whether the 11 September incident was conduct carried out in the absence or default of the official authorities of Afghanistan. Several features indicate that the provision is not fulfilled: Firstly, it would be required that Al Qaida, and its members carrying out the 11 September incident, was “in fact exercising elements of the governmental authority”, which seems doubtful. Furthermore, with the Taleban as the regime of Afghanistan, there is no “absence or default of the official authorities”. Hence the ILC Draft (2001), Art 9 provides not basis for making the 11 September incident conduct on behalf of Afghanistan.

In relation to Art 10 the question arises whether the 11 September incident was conduct by an insurrectional movement and hence being state conduct. There are no indications of any conflict between the Taleban and Al Qaida, so neither the ILC Draft (2001), Art 10 establishes any conduct on behalf of Afghanistan.

3 Conduct from the Territory of Afghanistan

3.1 The Problem

Since the 11 September incident was no state conduct as such by Afghanistan, the problem arises whether any form of support, active or passive, by Afghanistan to Al Qaida implicates an armed attack 11 September 2001. The answer depends on an interpretation of the UN Charter Art 51, in accordance with the principles of the Vienna Convention, in particular its Art 31.

Art 51 contains no explicit requirement of state conduct to qualify as armed attack, so the ordinary meaning seems to open for other conduct as well, *e.g.* in combination with state support short of making the non-state actor a state agent. However the provision does not specify who have the legal capacity to carry out an armed attack, so the ordinary meaning does not provide any clear answer to the problem.

3.1.1 Purpose of Self-Defence

The purpose of self-defence may give guidance to the question. As a tool for interpretation purpose is relevant in accordance with the principles of the Vienna Convention Art 31. The intention here is to analyse whether state support should be included as armed attack, and if so, under which circumstances, in light of the purpose of self-defence. In broader terms, the problem is whether such situations of support can be so grave that they should open for use of force in self-defence; does any state support to non-state actors justify use of force against that state or merely affecting it in an action against the non-state actor on its territory? Three aspects of the purpose of self-defence will be analysed below, namely the interests of the injured state, the interests of the supporting state, and the general system of rules governing force.

3.1.1.1 The Injured State

Firstly, regarding the injured state, the key interest is clearly the need of defence of the state. Two other aspects of armed attack indicate that such a need existed for the United States, namely the extent of the 11 September incident and the fact that it was directed against the state as such, as outlined in chapter 1 (section 1.1.1). In this context, it seems doubtful whether the need of self-defence is less since no state carried out the potential attack, all the more so, if the non-state actor has been supported by a state, which will be discussed further below. A need of self-defence in such a situation may also be viewed as a reflex of a possibly increased threat of international terrorism. There are current features of the international society that may contribute to such a threat, *e.g.* “rogue” states, “failed” states, general globalisation and spread of weapons of mass destruction.⁷⁰ The picture is obviously more complicated to explain causes of international terrorism in general, but the very fact that an extensive attack occurs within the borders of the only superpower of the world may as such illustrate an increased threat of international terrorism.

There may be a reason to distinguish between situations where the non-state actor is based on the territory of the supporting state and on the territory of the injured state. In the first situation, the only way for the injured state to act against the non-state actor, with unilateral use of force, is to rely on self-defence. In the latter situation, self-defence is not necessary to use force against the non-state actor. But there are problems with such a distinction: The supporting state may be a major problem for the injured state although there are no bases on the territory of the supporting state, hence creating a need of defence against that state as well. Moreover, it may be difficult to define where the non-state actor is based. The distinction also leaves out situations where the non-state actor is based in a state that neither is injured nor is supporting, but that is not the problem discussed in the thesis. If such a distinction is applicable, Afghanistan clearly

⁷⁰ Reflected *e.g.* by the Security Council in the annex to resolution 1456 (2003), pre-amble, para. 3 and 4, and the main part, para. 1.

falls into the first category, with extensive bases by Al Qaida on the territory and lack of interference in its activities as a major problem⁷¹ related to defence.

3.1.1.2 The Supporting State

In relation to the interests of the supporting state, it would clearly be an advantage with no right of self-defence linked to such support. Its interests would be affected by a self-defence action, even if merely the non-state actor were the target of the operation. Such an effect is serious and would constitute a violation of the fundamental prohibition of use of force between states unless the requirements of self-defence are met.⁷² In cases where the state object for self-defence action also has launched the violent action, it is clearly justified to establish an armed attack, and the situation would be a “classical” conflict between states. There was no such state conduct 11 September 2001, and this asymmetrical element brought in by the non-state actor Al Qaida makes it more difficult to accept an armed attack opening for force in self-defence affecting a state.

But if there is any state support to the conduct of the non-state actor, the asymmetry argument is weakened, and the more serious the support is, the more convincing are the reasons to equalise that situation with a situation where the non-state actor is turned into a state agent, as discussed in chapter 2. However to measure the seriousness of support is a challenge. One factor may be the *form* of support: Active support may be viewed more serious than passive, and it could be assumed that active military support is more serious than *e.g.* financial support. Such a reasoning seems reflected in the overview by Cassese (1989), presented in chapter 1 (section 1.1),⁷³ and the form of support may be one argument to establish the threshold in this “grey zone” of armed attack. And combinations of forms of support should increase the graveness of support. Furthermore, the *extent* of the support should be relevant, since it is hard to see why *e.g.* minor arms transfer under any circumstances should be armed attack. Also the *impact* on the non-state actor could be relevant. This may also be difficult to measure, but a standard such as “substantial and direct effect”, as required in international criminal

⁷¹ Compare Hegghammer (2002).

⁷² Based on the interpretation that Art 2 (4) includes all forms of military force, which is the prevailing view in legal theory, compare note 12 above.

⁷³ Cf. in particular the categories number three to five.

law,⁷⁴ may be relevant. Other factors should neither be excluded, and the question would remain on the circumstances of each case.

The seriousness of state support can therefore be described on a scale that depends on several factors and the facts of the actual situation. At a certain point at this scale the support may be so serious that an armed attack may be acceptable also in light of the interests of the supporting state, although the difficult question remains where to establish that threshold.

In relation to Afghanistan it is clear that the Taleban did not interfere in the conduct of Al Qaida on its territory.⁷⁵ There are also indications that there were close contact⁷⁶ between the Taleban and Al Qaida, but it is not clear whether the Taleban actually actively supported Al Qaida. Whether there is any passive support, in forms of acquiescence in the base activities by Al Qaida, is a question discussed in section 3.3 below. At this stage it is worth mentioning that the lack of interference at least was significant for the capabilities of Al Qaida: Having its headquarter based on the territory of a state constituted a major advantage in relation to its general activities and planning, including training of its members and “associates”.⁷⁷ Hence the *impact* of such potential passive support is an argument in favour of armed attack.

3.1.1.3 Rules Governing Force

Self-defence forms part of the rules governing threat or use of force between states, and its purpose ought to be interpreted in light of these rules. Firstly the problem is whether the prohibition of force expressed by the UN Charter Art 2 (4) implies that self-defence must be a clearly limited and not too broad category allowing use of force, and if so, whether this influences the question of armed attack in light of support by Afghanistan to Al Qaida.

⁷⁴ Cf. e.g. the ICTY statutes Art 7 (1).

⁷⁵ Cf. section 2.1.

⁷⁶ Ulfstein (2003, p. 160).

⁷⁷ Hegghammer (2002).

In general, threat or use of force between states is prohibited according to Art 2 (4). This main rule intends to minimise use of force, in the seeking of the fundamental purpose of the UN Charter of international peace and security. In other words, respect for the prohibition could avoid escalation of armed conflicts and contribute to the stability of the state system. A broad exception of unilateral force through the provision of self-defence could undermine the prohibition of force and its effectiveness. The UN Charter intends as well to keep self-defence subsidiary to the prohibition and use of force by the Security Council according to the mere wording of Art 51. There might be situations where there is need of self-defence, but where the interest of the international security prevails.⁷⁸

Therefore Art 2 (4) implies that self-defence *should* not be construed as a broad category, and its limits should be as clear as possible.

To accept armed attack by non-state actors in situations of state support may create several problems in this respect. It is not an easy task to clearly limit which situations are so grave that they should be covered,⁷⁹ and inclusion of state support may be open for abuse. Having said that, discretionary considerations are important for other conditions of armed attack, through the customary principles of necessity and proportionality, so a discretionary consideration in relation to armed attack should not necessarily be rejected. However the more discretionary consideration included in relation to self-defence, the more difficult it will be to limit, with the risk of being a too broad category.

These features are problems in relation to the UN Charter Art 2 (4), potentially undermining the main rule of use of force. But they may come in another light taking into consideration the lack of effective action by the Security Council based on the UN Charter Chapter VII. The problem is whether this lack of use of the mandate to

⁷⁸ Commentary to the Charter (2002, p. 792): “[B]eing caught in the ‘dilemma between security and justice’, the UN Charter deliberately gives preference to the former”.

⁷⁹ Some concrete examples are given in relation to acquiescence in section (3.3.3.2).

authorise use of force implies that self-defence must *not* necessarily be clearly limited or kept as a not too broad category.

It could be dangerous for the survival of states to respect a prohibition of use of force in any circumstances except in self-defence. Use of force can be an important and necessary tool not only against an armed attack, but also in other situations of instability between states, which may constitute a threat for the state system. Therefore the UN Charter constitutes the Security Council, provided with the competence to authorise use of force in certain situations of international instability pursuant to the UN Charter Chapter VII Art 42, cf. Art 39. The possibility to authorise does however not correspond with the actual practice by the Security Council, which is criticised on numerous occasions for lack of effective action, in particular before 1990.⁸⁰

An assumption is that this lack of effective action could legitimise that Art 51 *not* necessarily ought to be a clearly limited and not too broad category. However the UN Charter is designed in such a way that certain lack of effectiveness ought to be anticipated. The veto right has been an important factor in this respect. Although its use has been somewhat higher than expected, it could hardly have been impossible to forecast lack of action in some situations. On the contrary, the reason to include the veto right was to give a possibility to some of the most powerful states at the time an opportunity to hinder actions against their interests.

Therefore, it would not be true to state that the prohibition of use of force relies on the effective action by the Security Council to use force when needed. But it weakens the impact of the prohibition of use of force on the interpretation of Art 51, at least as regards state support in relation to non-state actor conduct, being a grey zone of armed attack and self-defence.

⁸⁰ *E.g.* dissenting opinion of Judge Jennings in the *Nicaragua* case, pp. 543-544.

3.1.1.4 Conclusion

A conclusion deduced of the purpose of self-defence is difficult to establish: Whereas the need of the injured state implies armed attack, the interest of the supporting state counters that need. But the more support, the weaker the latter argument is. An inclusion of even certain forms of support forms may nevertheless undermine the fundamental prohibition of use of force between states. The lack of effective action by the Security Council weakens the impact of that argument, but the strength of the prohibition of use of force may be decisive. A probable *conclusion* is therefore, in light of the purpose of self-defence that an armed attack should not be accepted in face of state support to a non-state actor. The conclusion is however not clear, and the weight of purpose is somewhat limited.

In the further analysis of state support, non-state actor conduct and armed attack a distinction will be drawn between active and passive support. Truly the difference between the categories should not be exaggerated, but the different characteristics by a commission and omission makes it feasible to make that distinction. The emphasis will be on passive support, being mostly relevant for Afghanistan, and also with newer state practice, in the aftermath of 11 September 2001.

3.2 Active support

3.2.1 Substantial Involvement

The problem is whether any active support by the Taleban constituted substantial involvement in the sending by Al Qaida of the perpetrators of the 11 September incident.

3.2.1.1 Legal Basis

In the *Nicaragua* case, the ICJ stated that

”it may be considered to be agreed that an *armed attack* must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its *substantial involvement* therein’. This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), may be taken to reflect customary international law.”⁸¹
(Italics supplied.)

The Definition of Aggression (1974), annexed to General Assembly Resolution 3314 (XXIX) (1974) was the result of a long process that included the work of a special committee for several years. A considerable period of time with negotiations between states was required before the resolution could be adopted unanimously by the General Assembly.

The stated aim of the Definition of Aggression (1974)⁸² is to define the term of “aggression” pursuant to Art 39, as one of the categories by which the Security Council has the capacity to act to maintain or restore international peace and security, including by use of force in compliance with Art 42. Since even a “threat to the peace” suffices for the Security Council to act, it may seem somewhat peculiar that the question of defining aggression was that controversial. But there might be other reasons for the

⁸¹ The *Nicaragua* case, p. 103, para. 195.

⁸² Pre-amble, para. 2, compare the resolution, para. 4.

controversies, *e.g.* fear for legal impact on the question of a possible crime of aggression, or impact on the right of self-defence, as will be discussed below.

Although the resolution, including its annex, is not binding for the member states of the United Nations, it contains interest as a factor of interpretation of the UN Charter, as outlined in chapter 1 (section 1.2.1.3). Two arguments strengthen the assumption in relation to the Definition of Aggression (1974): All member states voted in favour, and there is quite extensive work lying as a fundament of the resolution. Nevertheless due caution is required in the use of the document for the purpose of interpretation.

But the relevance is only clear in relation to the UN Charter Art 39, and another question is whether the Definition of Aggression (1974), Art 3 (g) is relevant for the interpretation of “armed attack” pursuant to the UN Charter Art 51. According to the Definition itself, it does not intend to impair rules governing use of force,⁸³ so that a definition of “armed attack” is beyond its scope. On the other hand, the ICJ applies the document in relation to this condition of self-defence in the *Nicaragua* case. But the ICJ does not argue explicit why “it may considered agreed” that armed attack includes the situation of Art 3 (g), and there are no references to state practice in this respect. The fact that the ICJ accepts the relevance thereof is however a strong argument for the relevance of the Definition of Aggression, Art 3 (g) for interpreting “armed attack”, and such relevance is therefore also the conclusion of the discussion here.

Formally the view by the ICJ in the *Nicaragua* case relates only to the right of self-defence in customary international law, since the ICJ could not apply self-defence pursuant to Art 51 in the actual case.⁸⁴ However the ICJ considers the content of the customary self-defence to be almost identical with Art 51.⁸⁵ This assumption is controversial⁸⁶, but it reveals that the ICJ would most likely consider the Definition of Aggression, Art 3 (g) as relevant also for self-defence in accordance with Art 51.

⁸³ Art 6.

⁸⁴ The *Nicaragua* case, p. 38, para. 56, cf. p. 26, para. 33.

⁸⁵ Compare Commentary to the Charter (2002, p. 805, cf. note 164).

⁸⁶ Commentary to the Charter (2002, pp. 805-806).

3.2.1.2 The Ordinary Meaning

For the purpose of the thesis, “substantial involvement” is the key notion of the Definition of Aggression (1974), Art 3 (g). According to *Black’s Law Dictionary* (1990), “substantial” is equivalent to “[o]f real worth and importance” or “of considerable value”. This definition gives however limited guidance, since the problem remains which threshold there is to make the involvement to be “of considerable value”.

With respect to “involvement”, the term is quite broad and can probably cover a variety of possible support by a state to a non-state actor, both active support such as supply of military equipment, finances or logistics and passive support such as acquiescence. The interesting question is however when such support is “substantial”. Before analysing whether any active support may be substantial, some preliminary points are presented:

There is an overlap between conduct on behalf of states and the requirement of “substantial involvement”: Where a state is substantially involved, the state support may be so extensive that the non-state actor is turned into a state agent. The problem to be discussed below is whether other situations of support, going beyond conduct on behalf of states, are covered by “substantial involvement”.

A pre-condition to apply substantial involvement in relation to Afghanistan is that the perpetrators of the 11 September incident were sent by Al Qaida in Afghanistan, and this question hardly seems doubtful.⁸⁷ Moreover, the perpetrators must qualify as “armed bands...”, which may be more doubtful according to the ordinary meaning of the term. However Al Qaida was well structured with military capabilities, and it is reasonable to characterise the perpetrators as “armed bands...”.

3.2.1.3 Application to Afghanistan

The question is whether any active support by Afghanistan in the conduct of Al Qaida on its territory constituted “substantial involvement” according to the Definition of Aggression (1974), Art 3 (g). Since active support is clearly “involvement”, the problem is whether any such support was “substantial”.

⁸⁷ Compare Fouda, Yosri (2002).

In general, active support by a state may have a considerable impact on the activities by a non-state actor on its territory. Extensive support may clearly be “of considerable value”, or “substantial”, in this respect. So the ordinary meaning of the term implicates that active state support may be “substantial involvement”, although it is not clear which threshold there is, *i.e.* which situations of active support are covered.

During the negotiations leading to the Definition of Aggression (1974), one controversy related to the conduct of non-state actors, and one of the contesting proposals included as aggression “[o]rganizing, supporting or directing ... acts of terrorism in another State”.⁸⁸ In a compromise proposal, leading to the final document, such a category was not explicitly included. However another term was instead inserted, namely “substantial involvement”. It is not clear whether or to which degree active support was to be covered by the term. In an analysis of the history of the Definition of Aggression (1974), Judge Schwebel, in his dissenting opinion of the *Nicaragua* case, indicates that the term of “substantial involvement” may cover state support.⁸⁹ But the question remains which situations actually may be covered.

According to the ICJ in the *Nicaragua* case, certain situations of active support are not covered by the UN Charter Art 51. The question was whether there was an armed attack by Nicaragua against El Salvador due to the flow of arms passing Nicaraguan territory on its way to insurgents in El Salvador. With reference to the Definition of Aggression (1974), Art 3 (g), the ICJ expressed that it

“does not believe that the concept of ‘armed attack’ includes ... assistance to rebels in the form of the provision of weapons or logistical or other support.”⁹⁰

Even if the sending of the weapons constituted conduct on behalf of Nicaragua, which was not proven, there would have been no armed attack by Nicaragua on El Salvador.⁹¹

⁸⁸ Dissenting opinion by Judge Schwebel in the *Nicaragua* case, p. 341, para. 162.

⁸⁹ Ibid, p. 343, para. 165.

⁹⁰ The *Nicaragua* case, pp. 103-104, para. 195.

⁹¹ Ibid., p. 119, para. 230.

It is not clear whether the ICJ discussed the condition of substantial involvement or sending. If the latter is correct, the judgement is hardly controversial: Art 3 (g) relates to sending of people, and not arms. Some more doubts are there in relation to substantial involvement, since it is not clear whether the requirement relates to the sending of “armed bands...” or to the violent incidents by the non-state actor abroad. The ordinary meaning opens for both alternatives, although it is argued in legal theory that only involvement in sending suffices.⁹² The latter assumption is strengthened by the *Nicaragua* case, since arms transfer, a potential involvement in violent incidents by the non-state actor abroad, is not accepted as substantial involvement.

In legal theory, the interpretation of substantial involvement by the ICJ has been characterised as “restrictive”.⁹³ This may be true as regards support to a non-state actor based merely in the injured state, since the ICJ excludes as armed attack almost any active support by a state in such situations.⁹⁴ But the ICJ does not discuss which level of support is necessary to be substantially involved in the sending by a non-state actor *from its own territory*, as the Taleban in relation to Al Qaida. Hence the judgement leaves open whether active support in such situations, *e.g.* by arms transfer, may qualify as armed attack.

A possible approach is that a restrictive interpretation should also be applied here. However the reasons for interpreting “substantial involvement” restrictively in the *Nicaragua* are not clear. One reason *could* be a fear that the term would provide a too broad basis for self-defence, and that a restrictive interpretation could support the prohibition of use of force aiming at international peace and security. But since the ICJ does not reveal its reasons for restrictive interpretation, it is difficult to argue that substantial involvement in general should be interpreted restrictively.

⁹² Zanardi (1986, p. 115).

⁹³ Ulfstein (2003, p. 160, with further references in note 20).

⁹⁴ Compare Gill (1988, p. 52).

Therefore there are good reasons to distinguish between situations of involvement in sending of non-state actors (“armed bands...”) from own territory and involvement in violent incidents abroad.⁹⁵ In practical terms active support can only in the first situation constitute “substantial involvement” pursuant to the Definition of Aggression (1974), Art 3 (g). If a state actively supports and is involved in activities by a non-state actor that is merely based abroad, *e.g.* in the injured state, the requirement of substantial involvement will not be fulfilled. Another question is that active support may be so extensive that the non-state actor is acting on behalf that state, as discussed in chapter 2, so that there nevertheless is an armed attack.

Nevertheless it is not clear how much active support a state must provide to be substantially involved in the sending of non-state actors from its territory.

In relation to Afghanistan there are however hardly any traces of active support by the Taleban to Al Qaida, so there is no substantial involvement on the basis of active support.

As to the general conclusion, it must be added that even if the *Nicaragua* case were considered relevant in relation to Afghanistan, the weight of the judgement is challenged by criticism by some of the judges in the ICJ itself, namely by the dissenting opinions by Judge Jennings and Judge Schwebel. Judge Jennings emphasised the possible significances of provision of arms in such cases, in particular “where it is coupled with other kinds of involvement”.⁹⁶ Furthermore, he stated:

“[T]o say that the provision of arms, coupled with ‘logistical or other support’ is not armed attack is going much too far.”⁹⁷

These critical comments have received some support in legal theory.⁹⁸ Combined with lack of extensive legal analysis by the ICJ itself, the weight of the statement of the

⁹⁵ Gill (1988, p. 40) argues in favour of a similar distinction.

⁹⁶ Dissenting opinion by Judge Jennings in the *Nicaragua* case, p. 543.

⁹⁷ *Ibid.*

⁹⁸ *E.g.* Gill (1988, p. 52).

Nicaragua case is weakened. The view of the majority prevails though probably, since the *Nicaragua* case is one of few and important judgements in the field of self-defence in international law.

Another question is whether a lack of substantial involvement excludes the option of an armed attack in face of active support by a state to non-state actors. In legal theory it is argued that the *Nicaragua* case is exhaustive on this point,⁹⁹ and therefore that there would be no armed attack. Truly, to accept self-defence in such a case would undermine the *Nicaragua* case as regards its effect on limiting the condition of “armed attack”. Nevertheless, the question of state support and armed attack is controversial, and it was neither brought in for the ICJ nor was it explicitly addressed by it. The lack of substantial involvement by Afghanistan, based on potential active support, does therefore probably not exclude the possibility of an armed attack provided there was any active support by the Taleban to Al Qaida on its territory.

3.2.2 *Use of Force*

“[A]rmed attack” is a term only used by the UN Charter Art 51 and must not be interpreted identically as “use of force” pursuant to Art 2 (4). There is an overlap between the terms, but the prevailing view in legal theory is that “armed attack” is the narrower notion of the two,¹⁰⁰ so which situations of “use of force” are *not* covered by Art 51 may not be clear. Nevertheless the problem will be whether any arguments linked to Art 2 (4) are relevant to establish armed attack in face of active state support to a non-state actor.

It is not clear whether the ordinary meaning of Art 2 (4) covers such support. But it is clear that only use of force “between states” is included, so that violent incidents by non-state actors can not be included as such. The problem is whether the role of the state, by active support, constitutes use of force. Unlike situations where the state uses

⁹⁹ Schachter (1993, p. 249).

¹⁰⁰ Commentary to the Charter (2002, pp. 790-792). Hence substantial involvement (section 3.2.1), as reflecting armed attack, is clearly covered by use of force as well.

force itself, which is partly discussed in chapter 2, Art 2 (4) is less clear and precise as to whether such indirect use of force is covered.

Art 2 (4) intends to reduce force between states in the seeking of the fundamental aim of the UN Charter of international peace and security. The efficiency of this main rule could decrease if state support under no circumstances is included, not even where there is extensive active support that is significant for the conduct of the non-state actor. But problems arise how to define which support is serious enough to be included, a problem already discussed in relation to self-defence (section 3.1.1). Also the main rule of force should contain certain predictability for states, which may be reduced by lack of clear limitations of the rule. The alternative of including all kinds of state support is neither preferable, since a too wide rule compared to its purpose could reduce the respect for the prohibition and hence also its efficiency. The purpose of Art 2 (4) therefore slightly implicates that state support should be excluded, and that if it nevertheless were included, the threshold should be relatively high.

Some light is shed on the problem by the Declaration of Friendly Relations (1970), annexed to the General Assembly resolution 2625 (XXV) (1970):

“Every State has the duty to refrain from *organizing, instigating, assisting or participating* in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”¹⁰¹ (Italics supplied.)

The declaration was the result of a long process that included the work of a special committee for several years, and a considerable period of time with negotiations between states was required before the resolution could be adopted unanimously by the General Assembly.

The aim of the declaration is to specify some of the basic principles of the UN Charter, and the cited statement is linked to the prohibition of use of force pursuant to Art 2 (4).

¹⁰¹ No. 1, para. 9.

Although the resolution, including its annex, is not binding for the member states of the United Nations, it contains interest as a factor of interpretation of the UN Charter, as argued in chapter 1 (section 1.2.1.3). In relation to this particular resolution emphasis seems further justified since states have been thoroughly discussing the issues, ending with consensus by all the member states, coupled with quite extensive work lying as a fundament of the resolution. Nevertheless due caution is required in the use of such a document for the purpose of interpretation.

The ordinary meaning of the statement is quite broad, and organisation, instigation, assistance and participation may cover numerous situations of state support to a non-state actor. In the *Nicaragua* case, the ICJ interpreted the terms when it discussed whether support by the United States to the *Contras* in Nicaragua constituted use of force.¹⁰² Based on the referred statement in the Declaration of Friendly Relations (1970) the ICJ identified supply of arms and munitions as use of force, whereas financial support was not considered a violation of Art 2 (4).¹⁰³

With respect to the negative definition, excluding financial support, this may be labelled as a restrictive interpretation of the Declaration of Friendly Relations (1970). The reasons are not clear, but a *possible* reason may be a fear of undermining the respect for the main rule of prohibition of use of force if its content is stretched too far. The ordinary meaning of the declaration, as an expression of state practice, contains weight as an argument against the *Nicaragua* case. On the other hand, the terms are open for discretionary consideration, and the view by the ICJ in one of few judgements in the field of rules governing force can hardly be ignored.

The problem is then whether financial support also ought to be excluded from the condition of “armed attack”. The assumption that armed attack is narrower than use of force is first and foremost linked to the requirement of certain scale and effect for an incident to be armed attack. It is less clear whether armed attack is narrower regarding who have the legal capacity to carry out an armed attack. Hence it is not given that

¹⁰² Pp. 118-119, para. 228.

¹⁰³ Ibid.

armed attack ought to be narrower in this respect, but to say that, on the contrary, that armed attack may include financial support, whereas it is not covered by Art 2 (4), would probably be going too far.

Therefore a possible conclusion is that active support by a state in form of financial support to a non-state actor that carries out violent incidents abroad is not covered by armed attack pursuant to Art 51.

However the problem remains which kinds of state support is covered by Art 51, if any at all. Truly the view of the ICJ in the *Nicaragua* case is that transfer of arms and munitions is a violation of Art 51, based on the Declaration of Friendly Relations (1970). But it remains unanswered whether this is true for armed attack. This is supported by the declaration itself, who states that the intention is not to impair other rules governing force,¹⁰⁴ so that a definition of “armed attack” is beyond its scope. And in contrast to the Definition of Aggression (1974), there are no statements by the ICJ supporting such relevance for armed attack.

Hence it is not possible to establish which kinds of active state support, if any at all, is positively covered by self-defence based on Art 2 (4) as interpreted in the Declaration of Friendly Relations (1970).

The question of whether any active support by a state may be armed attack is therefore not provided by neither the requirement of “substantial involvement” based on the Definition of Aggression (1974), nor based on Art 2 (4). In relation to Afghanistan the problem does not arise on the facts, but it contains interests for other cases. However the problem will not be further pursued, since the *main* focus of the thesis is the armed action in Afghanistan 2001 and its legality based on self-defence.

¹⁰⁴ No. 1, para. 13.

3.3 Passive Support

3.3.1 Substantial Involvement

The problem is whether any passive support by the Taleban constituted substantial involvement in the sending¹⁰⁵ by Al Qaida, based on the Definition of Aggression (1974), Art 3 (g), as reiterated in the *Nicaragua* case in relation to armed attack. The further discussion must be read in light of the analysis presented in section (3.2.1), *inter alia* in relation to the strength of the legal basis.

Since passive support is clearly an “involvement”, the question is whether any such support was “substantial”. As a point of departure, active support may easier be covered, but also passive support may be of considerable value: The lack of interference by the Taleban, a potential passive support, was important for the capabilities of Al Qaida, having the major advantage to operate freely on the territory of Afghanistan.¹⁰⁶ If there was such passive support, as will be discussed in section 3.3.3, it may be possible to characterise the involvement to be “substantial”. However the ordinary meaning of the term is not clear on this threshold.

The history of the Definition of Aggression (1974) sheds some light on passive support, as with active support discussed above. According to the view of Judge Schwebel, in his dissenting opinion of the *Nicaragua* case, support may be covered by “substantial involvement”.¹⁰⁷

With respect to the *Nicaragua* case it is argued above (section 3.2.1) that its negative definition of substantial involvement only relates to support to non-state actors in the injured state, and this restrictive interpretation lacks relevance to situations where the non-state actor is based *e.g.* on the territory of a passively supporting state. Hence the *Nicaragua* case does not exclude the possibility of acquiescence being covered by “substantial involvement”.

¹⁰⁵ Cf. section 3.2.1.

¹⁰⁶ Hegghammer (2002).

¹⁰⁷ Cf. section 3.2.1.

The conclusion remains open on whether passive support is covered by “substantial involvement” pursuant to the Definition of Aggression (1974), Art 3 (g), hence also whether the requirement was fulfilled in relation to Afghanistan. As outlined above, even if substantial involvement is lacking, there still may be an armed attack according to Art 51.

3.3.2 *Use of Force*

The problem is whether any passive state support to a non-state actor may constitute use of force in violation of the UN Charter Art 2 (4) and whether such a violation may be relevant for Art 51. As outlined above (section 3.2.2) the ordinary meaning is not clear in this respect, neither is the purpose of Art 2 (4).

Some guidance is provided by the Declaration of Friendly Relations (1970), stating that acquiescence is covered by Art 2 (4). As regards the negative definition by the ICJ in the *Nicaragua* case it relates to active support, and not passive support such as acquiescence. The problem is therefore whether this restrictive approach is relevant for the consideration of whether use of force covers acquiescence.

The reasons for the ICJ to use a restrictive approach are not clear. But it is clear that both questions relate to a quite similar issue, namely whether certain state support ought to qualify as use of force. In that sense, the *Nicaragua* case illustrate that such support is not necessarily force, according to the view of the ICJ, even if it is covered by the Declaration of Friendly Relations (1970). On the other hand, the *Nicaragua* case related merely to support by a state to a non-state actor in another state. Acquiescence relates to the passive support by a state to a non-state actor *on its own territory*, and it is far from clear whether the *Nicaragua* case gives any guidance to this situation.

So, the negative definition of the *Nicaragua* case is not relevant in relation to acquiescence, and in light of the ordinary meaning of the Declaration of Friendly Relations (1970), as a quite strong argument of state practice in the field, acquiescence is covered by the UN Charter Art 2 (4).

In contrast to active financial support as described above, there is no negative definition of acquiescence, excluding it from use of force. Hence it *may* also be relevant for Art 51. But such a positive definition of use of force gives however limited guidance to the interpretation of “armed attack”.

3.3.3 *Passive Support as Armed Attack*

The arguments presented so far are not clear as to whether passive support may be included as armed attack pursuant to the UN Charter Art 51. Truly the purpose of Art 51 slightly indicates that it should not be included, but neither the term substantial involvement nor use of force provides clear guidance to the question. Nevertheless the United States argued that there was an armed attack 11 September 2001, as will be further explored in relation to state practice and Security Council resolutions in section 3.3.4. This implies an analysis of the following problem: If some forms of passive support were to be included, which forms *should* be armed attack?

The focus of the discussion will be whether there is an international duty to refrain from acquiescence, and whether Afghanistan violated such a duty.

3.3.3.1 Acquiescence by Afghanistan

There exist relevant particular obligations for Afghanistan pursuant to several Security Council resolutions, which will be discussed in section 3.3.3.1.3. The main approach will however be to analyse whether Afghanistan violated any *general* duty of international law, so that it may be possible to compare the discussion with other incidents as well.

3.3.3.1.1 Legal Bases

In section 3.3.2 it is concluded that acquiescence is covered by the prohibition of use of force pursuant to the UN Charter Art 2 (4). Here, alternative bases for a duty to refrain from acquiescence will be shortly presented.

One problem is whether the Declaration of Friendly Relations (1970) expresses a duty of international law, independent of whether it is covered by Art 2 (4) or not. Such an assumption is supported by the Declaration of Measures to Eliminate International

Terrorism (1994), annexed to the General Assembly resolution 49/60 (1994), which contains a quite similar statement as the declaration of 1970,¹⁰⁸ hence confirming state practice in the field. Security Council resolution 1269 (1999) contains a statement in the same direction. A likely conclusion is therefore that international law envisages a duty for states to refrain from acquiescence in conduct by non-state actors on their territory when the conduct is directed against violent incidents abroad, independent of the prohibition of use of force.

Furthermore, a similar duty may be deduced by customary rules for states to avoid damage on other states, *i.e.* to act with due diligence.¹⁰⁹

The approach further will be based on acquiescence as use of force.

3.3.3.1.2 Duty to Prevent

3.3.3.1.2.1 Point of Departure

The ordinary meaning of acquiescence should be consulted as a starting point for the analysis, although its relevance can not be based on the Vienna Convention Art 31. *Black's Law Dictionary (1990)* defines acquiescence as “[p]assive compliance or satisfaction; distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent”, and as “[c]onduct from which assent may be reasonably inferred”. As an example it is mentioned that acquiescence can be “inferred from silence”, and a natural understanding is that lack of action by a state can be the basis of inference as well. Hence the essence of the term is, in our context, tacit consent that can be inferred from lack of action. The problem is however which action is required.

¹⁰⁸ No. 4, stating that “[s]tates ... must refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other States, or from *acquiescing in* or encouraging activities within their territories directed towards the commission of such acts” (italics supplied).

¹⁰⁹ Compare Dinstein (2001, p. 215) and the *Corfu Channel* case, p. 22 (“... every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”).

According to the Declaration of Friendly Relations (1970) the prohibited acquiescence relates to “organized activities ... directed towards the commission of [terrorist] acts” abroad, and the wording of the Declaration of Measures to Eliminate Terrorism (1994) is quite similar. There is undoubtedly a duty for states to act against such activities, but where the threshold is not clarified by the statements directly related to acquiescence in the General Assembly resolution. *E.g.* it is not clear whether the duty relates to the aim, *i.e.* that all such preparatory activities ought to be prevented, or to the measures taken.

The Declaration of Measures to Eliminate Terrorism (1994) also expresses that all states are “urged to” take *inter alia*

“*appropriate practical measures* to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens”¹¹⁰ (italics supplied).

The statement comes subsequent to the statement on acquiescence, so it seems as a relevant context for interpretation of acquiescence based on this declaration. However the weight of the statement is somewhat less: States are merely “urged to” take such measures, and not required to do so because it is a duty. Furthermore, the statement is not formally linked to use of force and the UN Charter Art 2 (4). But it is hard to see why there should be different approaches to acquiescence, dependent on whether it constitutes use of force or other violations of international law.

The cited passage of the Declaration of Measure to Eliminate Terrorism (1994) focuses on the measures to be taken, which should be “appropriate” and “practical”, and this supports the view that acquiescence relates to the measures, not the aim of the duty as such. On the other hand, the means should “ensure” that no preparatory conduct happens, and this may be viewed as supporting the approach focusing on the aim. But the term “ensure” also contains certain flexibility, so it is not a clear argument in this respect. Furthermore, if the intention were to express a duty to effectively prevent all such activities, the statement could have focused merely on the aim. But it does not. The

¹¹⁰ No. 5, litra a.

Declaration of Measures to Eliminate Terrorism (1994) therefore supports the view that the duty to refrain from acquiescence implicates a duty to take certain measures, and not to effectively prevent all such activities by non-state actors on their territory.

As regards the purpose of acquiescence, the interests of any state threatened or injured by such non-state actor conduct imply that the aim of the duty should be the relevant standard. The interests of the hosting state obviously support the approach emphasising the measures. The latter argument can be further supported by asking whether any state at all *could* secure that there are no organised activities on its territory directed towards terrorist acts abroad. It is questionable whether states would accept should an extensive duty and hence also questionable whether the approach focusing on the aim is reflected by the state practice expressed by the General Assembly resolutions of 1970 and 1994.

Since acquiescence is covered by Art 2 (4), the purpose of this provision may provide guidance as well: To ensure it remains the main rule governing force the prohibition of use of force should not be interpreted too narrowly, in contrast to the assumption of Art 51 and self-defence. In that respect, the approach focusing on the aim of the duty to prevent could secure a better main rule. But a too broad interpretation could also undermine the respect for Art 2 (4), and the threshold of the prohibition should not be too low either.

With some doubts attached, the duty to refrain from acquiescence implicates a duty to prevent by establishing a standard for which measures ought to be taken in relation to organised activities by non-state actors on its territory, and not in relation the aim as such. However it is not clear which measures ought to be taken to avoid a violation of the UN Charter Art 2 (4), *i.e.* when the measures are *inter alia* “appropriate” and “practical”. Such a discretionary consideration depends as well on the circumstances of each case.

In relation to Afghanistan, the lack of any measures at all to prevent the conduct of Al Qaida on its territory is an argument in favour of acquiescence. Such a consideration would be much more difficult in relation to states that actually have taken some

measures. With respect to Afghanistan, the problem further is whether other factors are relevant to the question of acquiescence by that state.

3.3.3.1.2.2 Knowledge

Knowledge by the state was discussed by the ICJ in the *Tehran* case, with regard to a duty to prevent certain conduct: Militants had seized the embassy of the United States in Iran, and the Iranian government had failed to take any required “appropriate steps” to protect the embassy or to prevent or stop the attack thereon, as required by the Vienna Convention on Diplomatic Relations (1961).¹¹¹ Furthermore, the Iranian state knew about “the urgent need for action”, and this was emphasised by the ICJ when concluding that Iran had violated its international duties.¹¹² It is however not clear whether the ICJ considered knowledge as a condition of violation or merely as a factor to the consideration.

The legal basis to apply knowledge is not clear, since there is not explicit analysis by the ICJ *e.g.* to establish relevance of such a factor or condition according to customary international law. However the *Tehran* case seems to be consistent with the earlier *Corfu Channel* case on this point. The background were mines on Albanian territory causing damage on two British ships and their crew, and the question was whether Albanian violated an international duty to notify and warn ships passing its territory.¹¹³ Albania had been inactive to prevent such consequences, and the ICJ emphasised that Albanian “knew, or ought to have known” of the laying of the mines when concluding that there was a violation of international law.¹¹⁴

The problem is whether knowledge therefore is relevant to establish acquiescence by Afghanistan in violation of the UN Charter Art 2 (4). In particular the *Tehran* case is interesting: Truly there is a difference in the sense that the violent conduct happened on the territory of the state, whereas acquiescence relates to conduct directed towards violent incidents abroad. More important is however that both situations relate to a duty

¹¹¹ The *Tehran* case, p. 31, para. 63.

¹¹² Ibid., p. 33, para. 68.

¹¹³ Compare the *Corfu Channel* case p. 22.

¹¹⁴ Ibid., p. 18, compare p. 22.

to prevent conduct by non-state actor on its territory. It is hard to see why knowledge should be irrelevant in relation to acquiescence in relation to the prohibition of use of force.

Certain support is also found in a duty to prevent in international criminal law, namely in relation to the crime of failure “to take the necessary and reasonable measures to prevent” certain acts in accordance with *e.g.* the ICTY statutes Art 7 (3), where knowledge is a condition to establish the crime. The relevance of the argument is however limited: Truly there are some similar considerations on the prevention of acts being committed. But the focus of international criminal law is the responsibility of individuals, and not the responsibility of state. It is far from given that these rules ought to be designed identically. So it seems doubtful whether international criminal law gives much support to the relevance of knowledge in relation to acquiescence and Art 2 (4).

There are several problems attached to the content of the relevant knowledge, or more precisely when the state “knew, or ought to have known” of the non-state actor conduct on its territory. Problems that will be pursued here are which threshold is proscribed by the term “ought to have known”, when the knowledge should be acquired, and who should have the knowledge.

The term “ought to have known” envisages a discretionary consideration. Which factors are relevant to the consideration is not elaborated by the ICJ in the *Corfu Channel* case, but some *possible* factors are pointed out: One factor may be to which extent the state has searched for information on the unwanted conduct by non-state actors, since it could undermine the duty to refrain from acquiescence if the state merely could argue that no knowledge was acquired, whereas no real search for information had been done. Important is that a state search for information in a solid and accurate way and the choice of methods for search is less significant. However it may help if national intelligence units are used in search for information on such conduct by non-state actors. Information may also be revealed *e.g.* through by investigations by the police, and it is important that such information is systematically analysed. But the state has probably a quite wide discretion to consider which extent of information search is necessary. Moreover, in relation to “ought to have known”, no state would have any

obligation to use methods of information search in violation of international humanitarian law or international human rights the state is bound by. In addition, the extent of the non-state actor operations is important; the more activity, the more likely the state ought to know of that conduct.

It seems reasonable that the state has a certain period of time to react from it “knew, or ought to have known” of the conduct by the non-state actors, so that the state has a factual possibility to take appropriate measures against that conduct before it can acquiesce in it. To the considerations it *may* be that the higher gravity of the threat against other states, the less time is allowed for preparations of appropriate measures to be taken. In particular this may be so, where a state is not only threatened, but already injured. In contrast, it is possible that the more complex measures that are required, *e.g.* due to the extent of the operations by the non-state actor, the more time is allowed.

Which persons are relevant to have such knowledge is neither clear. A possible answer is that it is sufficient that persons acting on behalf of the state, *de jure* or *de facto*, either “knew, or ought to have known” of the conduct by the non-state actor. The legal basis of such an approach is partly analysed in chapter 2.

In relation to Afghanistan, it seems quite clear that the Taleban “knew, or ought to have known” of the conduct of Al Qaida on its territory, directed towards violent incidents abroad. The existence of the Security Council resolutions on Afghanistan excludes as such the opposite conclusion. Hence this knowledge constitutes another argument in favour of acquiescence by Afghanistan in violation of the UN Charter Art 2 (4).

3.3.3.1.2.3 Ability

In the *Tehran* case, also the ability of the state to act was a factor to the consideration of violation of a duty to prevent. The ICJ emphasised *inter alia* that the failure to act by the Iranian state was “due to more than ... mere lack of appropriate means”.¹¹⁵ As with knowledge discussed above the ICJ does not state whether ability is a condition of violation or merely a factor to the consideration.

¹¹⁵ The *Tehran* case, p. 31, para. 63.

Another similarity is that the application of ability is not based on the Vienna Convention on Diplomatic Relations (1961), outlining the duty to prevent, and there is no explicit analysis by the ICJ on the legal basis of ability to the consideration of violation of that duty. And in contrast to knowledge, there is no support of ability by the *Corfu Channel* case. But the fact that the ICJ considers such a factor or condition relevant in relation to the duty based on the Vienna Convention on Diplomatic Relations (1961) is in itself a strong argument. Since there are clear similarities to the duty to refrain from acquiescence covered by the UN Charter Art 2 (4), ability as outlined in the *Tehran* case also ought to be relevant in this context.

Some support can be deduced from international criminal law also in relation to ability. In its jurisprudence relevant for the ICTY statutes Art 7 (3) the ICTY has applied a doctrine of “effective control”, requiring that the perpetrators ought to have the ability to prevent such acts. But the support is limited due to the differences described in the preceding section.

With respect to Afghanistan the problem firstly arising is whether the Taleban had the appropriate measures at disposal so the state could comply with its international duty to refrain from acquiescence. As described above it is not clear which measures are *inter alia* “appropriate” and “practical”, and the same difficulty is attached to whether the state has the capacity to take such measures. For the purpose of ability, a possible interpretation is measures that can *probably* prevent and stop the conduct of the non-state actor directed against violent incidents abroad.

It is far from clear that the Taleban had such ability. Differently, the picture was clear in the *Tehran* case: The failure by the Iranian state to act sharply contrasted previous occasions of a similar character, where the government had taken the appropriate means to prevent and stop the conduct.¹¹⁶ Such previous action has not been carried out by the Taleban, at least not in relation to similar conduct to the trainings and other activities by Al Qaida. Truly the Taleban had approximately 90 percent of the territory of

¹¹⁶ Ibid., p. 31, para 64.

Afghanistan under control, and functioned as the state *de facto*, including by taking law enforcement actions. But Al Qaida seems to have had a considerable capability to act, also militarily, so it is far from given that the Taleban would have succeeded, had it tried to act against the organisation. A likely assumption is therefore that the Taleban did not have the appropriate means at its disposal to comply with the duty to refrain from acquiescence according to the UN Charter Art 2 (4). As a starting point, this constitutes an argument against acquiescence by Afghanistan.

The problem further is whether any related factors weaken this ability argument. Although complete ability was lacking, the regime of Afghanistan could undoubtedly have taken *some* measures against the Taleban. But the Taleban did not. The problem therefore arises whether the ability argument is weakened.

No answer is found in the *Tehran* case: The ability of the Iranian state truly implicated the consideration, but it is not clear that lack of such would have lead to the opposite conclusion by the ICJ.

For the potential hosting state such an approach may cause problems: For Afghanistan, attempts to prevent the conduct of Al Qaida could have led the Taleban into a dangerous conflict with a non-state actor with considerable capabilities, with a risk of decreasing its general control of the territory. On the other hand, one option for the Taleban was to take some less significant measures against Al Qaida, with an important message to other states, signalling the will to do something against the non-state actor. Such action could have included taking explicitly distance to the intentions of Al Qaida. In this light, the lack of any measures at all indicates lack of will by the Taleban to comply with its international duties.

But to accept acquiescence in face of partial ability by a state may undermine ability as a factor to the consideration. And it may also be difficult to establish any threshold on ability at all, so that there may even be difficult to draw any distinction to states that are completely failed or collapsed. This problem should however not be exaggerated, since the threshold may be low for states with partial ability to avoid acquiescence. Moreover, even some measures could have an effect on non-state actors, and hence also a positive

effect for threatened or injured states, which is important in relation to the purpose of acquiescence as well.

All in all, the total inaction by the Taleban indicates lack of will to perform its international obligations, due to more than mere lack of appropriate means in accordance with the *Tehran* case. The argument weakens the implication of lack of ability to act and constitutes an argument in favour of acquiescence in violation of the UN Charter Art 2 (4).

Another problem is whether the ability argument is challenged if the hosting state receives any offer for help by other states. The duty to refrain from acquiescence aims at protecting other states. Lack of ability by a state can be important for the possibilities for a non-state actor to prepare terror acts abroad, and a denial of an offer for help from injured or threatened states can contribute to maintain this unwanted conduct. That is against the spirit of the duty to prevent.

The interest of the hosting state contrasts the argument: Help from other states will in this respect typically involve military support, and the presence of foreign military forces may be a controversial issue. A state can as well have several motives for not wanting such presence, in particular where there is lack of trust between the involved states.

Whose interests ought to prevail is a delicate issue in relation to such requests for help. But the situation is clearer where the conduct of the non-state actor leads to actual violent incidents abroad equivalent to an armed attack, such as the 11 September incident. Where the activities of the non-state actor continue in the aftermath of such an incident, a refusal of an offer for help by the injured state should be an argument in favour of acquiescence by the hosting state.

In relation to Afghanistan it is maybe not fully clear that no offers for help were presented, but it does not seem that any such direct offers were presented.

3.3.3.1.2.4 The Causal Element

Till now the discussion on acquiescence has related to the role of Afghanistan in relation to Al Qaida conduct on its territory. The problem is here whether there is any sufficient link between this preparatory conduct and the violent incidents abroad, in particular the 11 September incident. More precisely, the question is whether the conduct of Al Qaida in Afghanistan was “directed towards” such incidents abroad, as required of the duty to refrain from acquiescence according to the Declaration of Friendly Relations (1970).

The term “directed towards” implies a causal element between the conduct of the non-state actor on the territory and violent incidents abroad. Its ordinary meaning is not specific on *e.g.* the impact required of that conduct compared to other factors implicating the violent incidents, but as a starting point the term does not seem to establish any considerably high threshold.

But in relation to the very idea of acquiescence it is fundamental that there is a certain casual element between the hosting state and the incidents by the non-state actor in the injured state. Otherwise it is meaningless to apply such a notion. And also a certain level should be required to establish the causal element, and a possible interpretation is that there ought to be a clear connection between the non-state actor conduct in the hosting state and the violent incidents abroad.

In the comparable rule of international criminal law it is required that the lack of interference has a “direct and substantial effect” on the conduct that was not prevented, based on the ICTY statutes Art 7 (1). Although the relevance of the argument is limited, it slightly supports that there need to be a clear connection.

In relation to Afghanistan, the territorial basis of Al Qaida in Afghanistan was clearly important for the capabilities of the organisation. The activities by Al Qaida in Afghanistan included extensive trainings and probably various forms of support, including co-ordination, directions, intelligence, finances and logistics. It seems therefore clear that these activities were “directed towards” violent incidents abroad,

such as the 11 September incidents. This again is an argument in favour of acquiescence by Afghanistan in violation of the UN Charter Art 2 (4).

3.3.3.1.2.5 Proof

Some problems are mentioned in relation to the process to establish acquiescence: Problems are attached to proof, *i.e.* which standard is required and which state has the burden of proof, the hosting state or the threatened or injured states.¹¹⁷ Furthermore, there are problems connected to whether there ought to be any process giving the possibly acquiescing state a possibility to present its view, which time should be used on the process and who should decide.

3.3.3.1.2.6 Conclusions

The Taleban acquiesced in the conduct by Al Qaida on its territory, directed towards violent incidents abroad such as the 11 September incident, and Afghanistan therefore violated its duty pursuant to the UN Charter Art 2 (4).

Legally there are doubts attached to the basis of the duty, being based on *inter alia* General Assembly resolutions, although they seem close to state practice in the field. As regards the content, in particular the partial lack of ability by Afghanistan to act against Al Qaida constitutes a possible argument against acquiescence, even though the absence of any measures at all contrasts that argument.

3.3.3.1.3 Security Council Resolutions on Afghanistan

The doubts expressed on the *basis* of the duty to refrain from acquiescence are not relevant for Afghanistan: There exist particular duties introduced by various resolutions of the Security Council.¹¹⁸ Among other binding demands the Security Council has

¹¹⁷ Compare Scheideman (2000).

¹¹⁸ Cf. in particular Security Council resolutions 1189 (1998), 1214 (1998), 1267 (1999) and 1333 (2000). The two latter resolutions are explicitly adopted under the Charter Chapter VII, whereas also the resolution 1214 (1998) contains binding demands, *e.g.* in its operative part, para. 13.

required that the Taliban “stops providing sanctuary and training for international terrorists and their organizations”¹¹⁹ and that it takes

“appropriate effective measures ... to ensure that the territory ... is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens”.¹²⁰

Although the duty is not formally expressed as acquiescence, its essence is equivalent to the duty to refrain from acquiescence based on the UN Charter Art 2 (4). So it is fair to assume that the point of departure is similar as described above (duty to prevent, section 3.3.3.1.2.1), and that the factors of knowledge and ability, in addition to the causal element, ought to be applied in the same way as discussed above.

Hence the conclusion based on the Security Council resolutions is also that Afghanistan violated its international duties.

3.3.3.2 Purpose of Self-Defence

Previously, in section 3.1.1, it has been established that Art 51 must be a clearly limited and not broadly construed, in light of the prohibition of use of force, and that there hence are problem by accepting any state support as armed attack. Some examples thereof will here be given concretely related to acquiescence, based on the UN Charter Art 2 (4) as presented above.

Truly there is quite a high threshold in some respects: To qualify as acquiescence the lack of interference by the state must be causally linked not only to the activities by the non-state actor on its territory, but also to the actual violent incidents abroad, such as the 11 September incident. Having said that there are problems to limit the legal content of acquiescence: It is not fully clear whether the duty relates to the measures or the aim of the duty, and it is neither clear whether knowledge and ability are conditions or merely

¹¹⁹ Security Council resolution 1214 (1998), operative part, para. 13. Cf. also the resolutions 1267 (1999), operative part, para. 1 and 1333 (2000), operative part, para. 1.

¹²⁰ Security Council resolution 1267 (1999), operative part, para. 1. Cf. also resolution 1333 (2000), operative part, para. 1.

factors to the consideration. Also problems are attached to the implication of partial ability by a state and to which causal link are required between the non-state actor and the violent incidents abroad.

Furthermore, there are problems attached to the process to establish acquiescence. In relation to proof, it may be difficult for the state claiming self-defence to prove that the alleged acquiescing state had the ability necessary to carry out its duty to refrain from acquiescence. On the other hand, mere allegations that nothing is done by the other state is not enough. Neither the standard nor burden of proof is clear in this respect.

Furthermore, there are severe problems attached to the process establishing acquiescence. These problems are new compared to the “traditional” situation of self-defence, where an armed attack is carried out by the armed forces of a state, without creating such difficult questions of evaluation. Since the answers to the problems are far from clear, armed attack in face of acquiescence contains a potential abuse for the injured state.

In another, but related context there are some solutions to the problems of establishing acquiescence. Several antiterror conventions contain procedures where a state either must prosecute or extradite alleged perpetrators of terrorist acts. It is doubtful however whether these procedures are relevant for self-defence. Truly it is argued that the limits between self-defence and criminal law, in light of *inter alia* the antiterror conventions, would be blurred by accepting armed attack in relation to non-state actor conduct,¹²¹ e.g. in relation to acquiescence. But these conventions may remain ineffective if a state acquiesces in the conduct leading to terrorist acts abroad. Even if a state were to act in accordance with these conventions, self-defence is still another field of law and would remain unaffected by any potential overlap by the antiterror conventions.

¹²¹ Compare e.g. Cassese (2001).

3.3.4 *State Practice and the Security Council*

State practice is undoubtedly a relevant source of interpretation of the UN Charter Art 51 in compliance with the Vienna Convention Art 31 (3) (b). And the factual importance of state practice is strengthened by the lack of clarity by Art 51 on the question of acquiescence and armed attack.

In relation to most of the state practice presented in the following there exist resolutions by the Security Council. The approach will therefore be to analyse the implication on the interpretation of Art 51 by interplay of state practice and Security Council resolutions.

3.3.4.1 Israel

In its practice Israel has repeatedly referred to the right of self-defence in the aftermath of violent incidents in Israel allegedly carried out by the Palestine Liberation Organization (PLO). A clear example thereof is the Israeli use of force against bases of the PLO in Lebanon 1982.¹²²

The problem is to identify any official Israeli arguments linked to the fact that a non-state actor is claimed to carry out an armed attack, or any possible argument of acquiescence by Lebanon in this respect, since the arguments have been restricted in general to the existence of an “armed attack” pursuant to Art 51. In legal theory it has been emphasised in this respect that the failure of Lebanon to prevent the activities by the PLO on its territory constitutes a violation of the international duties by Lebanon to refrain from acquiescence,¹²³ but of course this does not provide guidance to the official view of Israel.

In its practice, the Security Council has condemned several of the actions in alleged self-defence by Israel as *e.g.* a “reprisals” or as “disproportionate”.¹²⁴ However there are no arguments linked to the non-state actor element, nor any possible acquiescence. The

¹²² Dinstein (2001, p. 218), with further reference to Feinstein (1985).

¹²³ Feinstein (1985, pp. 395-396, cf. pp. 370-381).

¹²⁴ O’Brien (1990, pp. 436-437).

problem is whether the lack of critics on this point constitutes a tacit consent in *e.g.* acquiescence as armed attack. If the Security Council did not agree with this aspect, it would have been clearer if the condemnation also related thereto. On the other hand, the Security Council may have had other reasons for omitting such criticism, and one *possible* reason is that its members may have found other parts of the self-defence argument more urgent to criticise, such as the alleged reprisal element and the lack of proportionality. Moreover, the argument of “armed attack” has never been accepted by the Security Council in this context.

As outlined in chapter 1 (section 1.2.1.4), such Security Council resolutions have impact on the interpretation of the UN Charter Art 51 as such. Furthermore, they may have an influence on state practice as a particular appeal for states disagreeing with the view of the Security Council. Due caution is required in this respect, but in the actual examples there are numerous resolutions over a long period time, and these factors alone implicate strength of the resolutions in relation to state practice.

The lack of specificity by the resolutions on non-state actors and acquiescence implies that the resolutions are no clear argument against armed attack in such situations. Having said that, they do not support such an approach either. And the lack of acceptance of “armed attack” in any of the relevant Israeli cases indicates that the resolutions are closer to rejection than acceptance of such an approach. The conclusion therefore remains that there is no clear solution on the question of acquiescence and armed attack pursuant to the UN Charter Art 51 based on the Israeli practice in light of the relevant Security Council resolutions.

3.3.4.2 South Africa

Also South Africa has applied such a self-defence argument to legally justify its armed action against bases of the African National Congress (ANC) abroad in the aftermath of violent incidents in South Africa. A similar problem arises, as in relation to the Israeli practice: There is no specificity on the question of acquiescence and non-state actors in relation to the condition of “armed attack”, neither by South Africa, nor by the Security Council in its resolutions. Therefore the conclusion remains equivalent to the

conclusion presented in relation to the Israeli practice above. Due to this feature the facts and arguments linked to South Africa are not further explored.¹²⁵

3.3.4.3 The United States: Afghanistan and Sudan 1998

The armed action by the United States in Afghanistan and Sudan 1998 contains some similarities to the 2001 operation. American embassies in Kenya (Nairobi) and Tanzania (Dar-es-Salaam) had been bombed August 1998, resulting in the killings of more than 200 people and injuries of several other people, in addition to material damages. Suspects were members of Al Qaida network. In relation to subsequent bombings of training bases of Al Qaida in Afghanistan, and of an alleged chemical factory in Sudan (Khartoum), the United States applied a self-defence argument.

There is a clear similarity to the self-defence argument by Israel and South Africa. Nevertheless, the Security Council did not condemn the armed action in any resolution. Neither were any proposals for resolution rejected by the veto of the United States. The problem is therefore whether this lack of condemnation by the Security Council constitutes an attitude to the self-defence argument in contrast to its previous view. This is far from given, and neither in relation to Israel have all relevant armed action been condemned by the Council. It is therefore doubtful whether the lack of condemnation constitutes any tacit consent, accepting armed attack in face of acquiescence.

3.3.4.4 The United States: Afghanistan 2001

7 October 2001 the armed operation in Afghanistan started by the United States in proclaimed self-defence in accordance with the UN Charter Art 51.¹²⁶ As arguments of interpreting Art 51, the strength of Security Council resolutions and state practice will be analysed respectively below. The relevance for acquiescence and armed attack is a separate point for discussion, and finally some comments related to *jus cogens* are presented.

¹²⁵ For details, cf. *e.g.* Kwakwa (1987).

¹²⁶ The United States were supported by several states acting in allegedly *collective* self-defence. Any possible, particular problems on collective self-defence will not be discussed in the thesis.

3.3.4.4.1 Security Council Resolutions

7 October 2001 the armed operation in Afghanistan started by the United States in proclaimed self-defence in accordance with the UN Charter Art 51. Already before 7 October the Security Council reached two resolutions of interest for the matter, and their implication for the interpretation of Art 51 as such will be the first problem topic for discussion.

12 September 2001 the Security Council condemned the 11 September incident as an act of terror in its resolution 1368 (2001) and referred to the right of self-defence in the pre-amble:

“Recognizing the inherent right of individual or collective self-defence in accordance with the Charter.”

Although the resolution is not binding, it ought to have emphasis to the interpretation of Art 51 by virtue of expressing the view of the important treaty body for international peace and security (compare section 1.2.1.4). But the reference ought to be analysed with due caution. Decided upon the day after the incident, there was still far from clear *e.g.* which state element, if any, there was in the act. The feeling of an urgent need for action, combined with high political focus on the 11 September incident and problems arising there from, may have led to a too quickly produced text.

Nevertheless, the wording ought to be the clear point of departure not only in treaty interpretation following the principles of the Vienna Convention, but also for the interpretation of Security Council resolutions. Although the reference could have been even clearer, explicitly connected the 11 September incident, it can hardly be understood in another way than that, to the opinion of the Security Council, there was an “armed attack” 11 September 2001 pursuant to the UN Charter Art 51.

Some of the uncertainty above is reduced by Security Council resolution 1373 (2001), since the Council here reiterated the reference to self-defence in its previous resolution. The resolution contains binding provisions for all member states to introduce measures against the financing of terrorism. This binding effect strengthens the impact of the

resolutions on the interpretation of Art 51, although the reference to self-defence itself is contained in the non-binding pre-ambles.

These authoritative statements by the Security Council constitute forceful arguments for the interpretation of Art 51, although some caution is required for their application. Moreover, they contain possible argument of state practice, which will be addressed in the section below.

3.3.4.4.2 State Practice

Several statements were expressed by other intergovernmental organisations as well. The North Atlantic Council of the North Atlantic Treaty Organisation (NATO) stated 12 September 2001 that the 11 September incident

“if it ... was directed from abroad ... shall be regarded as an action covered by Article 5 of the Washington Treaty, which States that an *armed attack* against one or more of the Allies in Europe or North America shall be considered an attack against them all” (italics supplied).¹²⁷

The statement was supported by parliamentary leaders of the 19 NATO countries 14 September,¹²⁸ and these statements of support were further confirmed one day after the start of the military operation in Afghanistan.¹²⁹

Similar statements were expressed by the European Union (EU), e.g. by heads of government 19 October 2001.¹³⁰ The Organisation of American States (OAS) invoked the Rio Treaty Art 3 on 21 September 2001, resolving that the events of 11 September “are attacks against all American states”, recalling the right of self-defence.¹³¹ As well, the Australian Prime Minister stated “that the collective security provision of Article IV

¹²⁷ Statement by the North Atlantic Council (12 September 2001).

¹²⁸ United States Government Report: A Chronology (20 December 2001).

¹²⁹ Statement by NATO Secretary General, Lord Robertson (8 October 2001).

¹³⁰ United States Government Report: A Chronology (20 December 2001).

¹³¹ Decision by the OEA (21 September 2001).

applied to the terrorist attacks on the United States” as regards the Security Treaty Between the United States, Australia, and New Zealand (ANZUS).¹³²

These statements are not only expressed by treaty organs of the respective organisations, but also by representatives of the member states as well and constitute arguments for the practice of these states. Due caution may be needed, but quite clearly most Western countries, through these statements, expressed their support to the United States by viewing the 11 September incident as an armed attack pursuant to the UN Charter Art 51. Some other states must be included in this group as well: The United States claims it “received 46 multilateral declarations of support from organizations”¹³³. As well all members of the Security Council at the time ought to be included in the group.

All in all, numerous states considered there was an armed attack 11 September 2001. The group includes powerful states of the world, and not only the number of states but also their power may be a relevant factor to consider the impact of state practice.¹³⁴

The view of some states contrasts the above, but only a few states explicitly denied any armed attack 11 September 2001.¹³⁵ These statements reduce somewhat the strength of the state practice argument, but are not the real problem of the discussion.

The difficult problem is the role of the lack of protests from the states that neither explicitly supported nor protested against the claim of armed attack against the United States. The question is whether such lack of protests constitutes acquiescence in the statements made by states and intergovernmental organisations in the aftermath of the

¹³² United States Government Report: A Chronology (20 December 2001).

¹³³ United States Government Report on Terrorism (19 December 2001).

¹³⁴ Compare Shaw (1997, pp. 62 and 63) and Separate Opinion of Judge Higgins in the Advisory Opinion on *Nuclear Weapons*, p. 2.

¹³⁵ These states include Iran, Iraq, Syria and Sudan, whereas less clear protests were expressed by Cuba and North Korea (cf. New York Times on the web and BBC on the web).

11 September incident.¹³⁶ In general, the motives for lack of protests can be numerous and are not necessarily legally founded. And clearly the point of departure is that consent requires action by the state, not that action is required to avoid tacit consent in forms of acquiescence. Moreover, the rules governing force are fundamental for the legal order of international peace and security, and it may open for abuse to interpret lack of protests as support for a certain interpretation of self-defence, being the only clear exception¹³⁷ for unilateral force.

On the other hand, the fundamental body for international peace and security according to the UN Charter expressed its support to the perception of an “armed attack”

11 September 2001. If member states of the United Nations, which includes practically all states of the world, were disagreeing with the Security Council, protests could be called for to prevent a certain development international law in terms of treaty interpretation. This argument is strengthened by the fact that not only a few, but quite a number of states, including powerful such, supported this view.

In total it seems justified to view the lack of protests as acquiescence, with the Security Council resolutions being a significant argument.

Therefore there is almost a full generality on the state practice in the aftermath of 11 September 2001, constituting an argument of the incident that date being an “armed attack” pursuant to the UN Charter Art 51.

Having said that, the state practice has obviously not been consistent over time yet. But state practice can be a forceful argument although its duration in time is limited.¹³⁸ In relation to customary international law, rules regarding air space were considered established following the first space rocket launching 1958.¹³⁹ Another example of so-

¹³⁶ Compare Brownlie (1998 p. 6), who states, as regards the discussion on the generality of custom, that “the real problem is to detect the value of abstention of protests by a substantial number of states in face of a practice followed by some others”.

¹³⁷ Compare Commentary to the Charter (2002, p. 789).

¹³⁸ Brownlie (1998, p. 5).

¹³⁹ Ibid.

called “instant custom” is the formation of the customary rules of economical zones of 200 miles in the 1970s preceding the entry into force of the United Nations Convention on the Law of the Sea (1982).¹⁴⁰ As regards the custom and air space, there is a significant difference to the present discussion: The establishment of such rules did not inflict with existing rules protecting other states. Whereas the establishment of economical zones reduced the right of state in relation to the respective coast states, those rights can hardly be characterised as vital as the right under issue, namely the right not to be object for unilateral use of force by other states except in self-defence.

These examples have been compared to the use of force by NATO in Kosovo 1999, based on an independent exception from Art 2 (4) as humanitarian intervention. The argument has been that, compared to the examples above, that more should be required to establish a new exception for unilateral force, since it could affect much more seriously the existing rights of other states.¹⁴¹ The argument contains interest for self-defence, since a widened scope could seriously affect other states in a similar manner. On the other hand, the question of interpretation of a clearly established exception to the prohibition of use of force differs from the establishment of a new exception, and a somewhat widened interpretation in light of state practice is another issue. Even such an approach were valid for self-defence, the conclusion could be different then the Kosovo intervention: Whereas states in general were reluctant to accept the legality of this intervention, even among the states who participated in the operation,¹⁴² the general attitude is considerably different in relation to the armed operation in Afghanistan and the 11 September incident as an armed attack.

All in all, the lack of consistency over time somewhat decreases the weight of state practice as a source of interpretation of Art 51. But it is not decisive. The almost full generality of the state practice constitutes a strong argument that the 11 September incident was an “armed attack” as required for self-defence pursuant to the UN Charter Art 51.

¹⁴⁰ Ibid.

¹⁴¹ Cassese (1999, pp. 796-797).

¹⁴² Ibid., p. 797, compare 792-793.

3.3.4.4.3 Relevance for Acquiescence

The question remains whether the state practice implies that acquiescence is the relevant factor to establish the armed attack 11 September 2001. The attitude of the state acting in alleged self-defence may be a point of departure for the interpretation of state practice in this respect. In a letter 7 October 2001, the United States notified the President of the Security Council on its exercise of self-defence and referred to the “decision of the Taliban regime to allow” the conduct of Al Qaida on its territory. A “decision ... to allow” does not necessarily imply acquiescence. On the contrary, a natural understanding is that it constitutes an avowed consent, which is to be distinguished from acquiescence.¹⁴³ Having said that, the term used by the United States does not by any means exclude the option that acquiescence is viewed relevant to establish the armed attack.

Further guidance may be provided by the response by the President of the Security Council 8 October 2001, where he expressed that the members of the Council were “appreciative” of the presentation by the United States and the United Kingdom.¹⁴⁴ The President does not refer to any “decision” by the Taleban, but merely characterises the regime as “those who harboured” Al Qaida organisation. In its resolutions on Afghanistan the later years, the Security Council focused on the “shelter” or “harbour” provided by the Taleban, in other words the violation by the Taleban of its duty to prevent the activities of Al Qaida. Hence it seems that the President of the Security Council refers to acquiescence, and not any avowed consent by the Taleban.

The letter by the United Kingdom to the President of the Security Council 7 October 2001 is consistent with such an assumption, since it refers to support by the Taleban to Al Qaida.

Nevertheless there are clear problems by interpreting the referred statements, since none of them explicitly deals with the concept of armed attack in relation to non-state actor

¹⁴³ Compare *Black's Law Dictionary (1990)*, who states that acquiescence “is to be distinguished from avowed consent ...”.

¹⁴⁴ Press Statement by the Security Council President (8 October 2001).

conduct and acquiescence. This illustrates a general problem by interpreting state practice, since there is often some lack of specificity on the concrete content of requirements considered fulfilled. However this does not mean that conclusion can not, or should not be drawn on the implication of acquiescence to an armed attack 11 September 2001. It means however that such a conclusion is not *clearly* supported by the state practice.

3.3.4.4 Jus Cogens

Finally a problem is whether this state practice argument must be ignored in light of a *jus cogens* argument, more precisely whether the concept of *jus cogens* hinders the development of self-defence in the described direction. The problem presupposes that self-defence is *jus cogens*, which is far from given.¹⁴⁵ Firstly the general construction of peremptory norms of international law must be accepted; the prevailing view in legal theory is that such a construction exists. The prohibition of use of force between states constitutes a clear example of a norm of *jus cogens* character, at least as regards the core of the prohibition.

Since a widening of the scope of an exception inflicts the scope of the main rule, the argument is that self-defence as exception also ought to be a peremptory norm. And self-defence needs to be interpreted in the context of other rules governing use of force. But it is required that almost all states agree on the character of *jus cogens*. And whereas this seems quite clear in relation to Art 2 (4), it is hardly commented upon in relation to self-defence, so it is difficult to argue in favour of such an agreement in relation to self-defence.

For the sake of the argument, self-defence as *jus cogens* would arise the problem of whether state practice must be *e.g.* more consistent and general to have an impact on the interpretation of Art 51, widening its scope. A peremptory norm of international law can only be changed according to the process proscribed by the Vienna Convention Art 53, and it is not clear that any such process has happened with self-defence and the role of acquiescence in the condition of armed attack. But it is not clear that there is any change

¹⁴⁵ Dinstein (2001, pp. 164-165).

of self-defence. More likely is that it relates to a change of interpretation. And it is not dramatically compared to the wording. It will be a change compared to earlier state practice and Security Council resolutions, but even these are not clear in the field.

So it seems doubtful that the *jus cogens* argument affects the conclusion as regards state practice above.

3.3.5 *Conclusions*

There was an armed attack against the United States 11 September 2001, in face of the acquiescence by Afghanistan in the conduct of Al Qaida on its territory. Decisive has been the strength of state practice in the aftermath of the 11 September incident, coupled with the Security Council resolutions on the matter. In addition, support is deduced from the Definition of Aggression (1974) and its term “substantial involvement”, as referred to in the *Nicaragua* case. A possible counterargument is found in previous state practice, as highlighted by Israel, and the reactions from the Security Council, but it is not clear whether it relates to armed attack and acquiescence.

But the state practice and Security Council resolutions in the aftermath of 11 September 2001 are neither specific on the role of acquiescence and non-state actor conduct in relation to armed attack. However the assumption presented in the thesis is that acquiescence is a possible *and* feasible approach to analyse that aspect of armed attack.

4 Conclusions

The events of 11 September 2001 constituted an “armed attack” pursuant to the right of self-defence contained by the UN Charter Art 51. Decisive for the conclusion is the acquiescence by the Taleban in the conduct by Al Qaida on its territory, which was directed towards violent incidents abroad.

The approach has been to analyse who can carry out an armed attack, and under which circumstances, with Afghanistan as the important focus, and a distinction has been drawn between conduct by a state and conduct from a state. State conduct may undoubtedly be an armed attack, and the question in chapter 2 was whether there was such state conduct. The threshold following from the customary rules of state responsibility is quite high, and based on these rules there was no conduct on behalf of Afghanistan 11 September 2001.

Conduct from a state, in combination with state support, was analysed in chapter 3, and a distinction was made between active and passive support to non-state actors. It is not clear whether any active support is an armed attack pursuant to Art 51, although *e.g.* financial support is not covered. If active support may be included by “armed attack”, the threshold should be high. However there was clearly no armed attack on that basis in relation to the 11 September incident, since no active support was identified from the Taleban to Al Qaida. But the passive support of the Taleban, acquiescing in the conduct of Al Qaida on its territory, was sufficient to establish an armed attack 11 September 2001.

The strengths and weaknesses of the interpretations given of the UN Charter Art 51 and its term “armed attack” need particular comments: As regards the question of state conduct in chapter 2, it relies on a quite firm legal basis, through the customary rules of state responsibility. The view of the ILC in its Report (2001) should not be taken for granted as customary international law, but on the important parts of the analysis the

assumptions by the ILC are confirmed by judgements in particular by the ICJ, in the *Nicaragua* case and the *Tehran* case. This does not mean that the picture is clear, since *inter alia* the criticism expressed by the ICTY in the *Tadic* case of the requirement of “effective control” contains certain weight.

The purpose of Art 51 and armed attack formed the point of departure for chapter 3, concluding that an armed attack should not be accepted in situations of state support short of making the non-state actor a state agent. This assumption deserves emphasis but should not be exaggerated since aspects of that purpose also provides argument in favour of armed attack in some situations of state support.

Furthermore, two General Assembly resolutions were applied, namely the Definition of Aggression (1974) (substantial involvement) and the Declaration of Friendly Relations (1970) (use of force). The essential argument in relation to both resolutions was that they neither open nor close the door for state support being armed attack. The value of these resolutions as legal arguments of treaty interpretation relies first and foremost as possible reflections of state practice, since in particular the resolutions are approved by all the member states of the United Nations. But the application of such resolutions remains somewhat controversial, and all due caution has been required in the discussion of them.

Passive support was analysed more in depth, being particularly interesting in relation to Afghanistan: As regards the violation of the duty to prevent it must be emphasised that the legal basis was not only the Declaration of Friendly Relations (1970), in relation to the UN Charter Art 2 (4), but also binding Security Council resolutions on Afghanistan. Legal doubts are however attached to the content of acquiescence, both in relation to the factors of knowledge and ability, based on the views by the ICJ in the *Tehran* case and the *Corfu Channel* case. With respect to the relevance of acquiescence for armed attack, state practice in the aftermath of 11 September 2001 was emphasised: It is quite extensive, although the implication of lack of protests by a vast number of states is controversial, even in light of the statements by the Security Council in the pre-amble of the resolutions 1368 (2001) and 1373 (2001). And it is yet to whether this line of state

practice will be confirmed in relation to other incidents similar to the 11 September incident.

There are in total doubts attached to the conclusions, but the arguments of accepting an armed attack 11 September 2001 in face of the acquiescence by Afghanistan seem convincing.

A reservation to the conclusions in relation to Afghanistan must be taken to the factual basis: Some relevant information has been hardly available, so the conclusion must be viewed in light of this fact.

The question remains whether *analogies* can be called for in other situations where states acquiescence in non-state actor conduct directed towards violent incidents abroad. State practice in relation to the specific incident 11 September 2001 was decisive for the conclusion in relation to Afghanistan, and acceptance of armed attack in such a situation has not occurred in newer state practice before that incident. It is therefore far from clear that other similar incidents in the future will automatically be covered by armed attack without any *further confirmation by states in their practice*.

Attention must also be drawn to other aspects of self-defence, both in relation to the 11 September incident and other similar incidents. Firstly the extent of the armed attack must be sufficient, and the acts must be directed against a state. These aspects of armed attack were not controversial in relation to the 11 September incident. Therefore the state practice in the aftermath contains hardly any acceptance of the argument that several violent incidents can be accumulated to an armed attack, which is an important part of *e.g.* the Israeli self-defence argument.

Moreover, the customary self-defence requirement of proportionality and necessity must be completed: Proportionality implies *inter alia* the question of whether it is legal to militarily target the regime of a supporting state, such as the Taleban, or only the non-state actor in the self-defence operation. There is also a problem, in relation to necessity, of whether a military response is an illegal reprisal, and not a self-defence action. Necessity also indicates that use of force is the last resort, and also in the “war against

terror” other means must be considered or tried, such as diplomatic, economical or judicial means.¹⁴⁶

There are legal challenges indeed in the aftermath of the 11 September incident. Self-defence is a category for use of force that is easily put under pressure, containing the only clear legal basis for unilateral force. Self-defence also ought to be a realistic category, reflecting the needs of defence of states. Although the 11 September incident was an armed attack, careful considerations must be done to establish whether similar incidents may be covered by Art 51. Particularly it will be important which view will be expressed by states in their practice on this problem. In that sense the legal situation is clearer, but not *considerably* clearer, than it was before 11 September 2001.

¹⁴⁶ Compare Cassese (1989, pp. 604-608).

5 Sources

5.1 Bibliography

Black's Law Dictionary (1990), by Henry C. Black et. al., 6th ed., St. Paul: West Publishing Co., 1990, 1657 pages, ISBN 0-314-76271-X

Bowett, Derek W. (1958), *Self-Defence In International Law*, Manchester: Manchester University Press, 1958, 294 pages

Bowett, Derek W. (1972), Reprisals Involving Recourse to Armed Force, pp. 1-36, in: *American Journal of International Law*, Vol. 66 (1972)

Bring, Ove (2001), En rätt til väpnat självförsvar mot internationell terrorism? [A Right to Armed Self-Defence Against International Terrorism?], pp. 241-251, in: *Juridisk Tidsskrift vid Stockholms Universitet [Journal of Law at the University of Stockholm]*, Vol. 13 (2001-2002)

Brownlie, Ian (1963), *International Law and The Use of Force by States*, Oxford: Clarendon Press, 1963, 532 pages, ISBN 0-19-825158-0

Brownlie, Ian (1998), *Principles of public international law*, 5th ed., Oxford: Clarendon Press, 1998, 743 pages, ISBN 0-19-876299-2

Byers, M. (2002), Terrorism, The Use of Force and International Law After 11 September, pp. 401-414, in: *International and Comparative Law Quarterly*, Vol. 51 (2002)

Campbell, Leah M. (2000), Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan, pp. 1067-1096, in: *Tulane Law Review*, Vol. 74 (2000)

Cassese, Antonio (1989), The International Community's "Legal" Response to Terrorism, pp. 589-608, in: *International and Comparative Law Quarterly*, Vol. 38 (1989)

Cassese, Antonio (1999), A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*, in: *European Journal of International Law*, Vol. 10 (1999)

Cassese, Antonio (2001), Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, pp. 993-1002, in: *European Journal of International Law*, Vol. 12 (2001)

Commentary of the Charter (2002). *The Charter of the United Nations: a commentary (2002)*, ed. by Bruno Simma; in collaboration with Hermann Mosler et al; assistant editors Andreas Paulus, Eleni Chatidou, 2nd ed., Oxford: Oxford University Press, 2002, 1405 pages, ISBN 0-19-925377-3 (ib.)

Crawford, James (2002), *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries*, Cambridge: Cambridge University Press, 2002, 387 pages, ISBN 0 521 81353 0

Delbrück, Jost (2001), The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? (Cont: Some Comments on the International Legal Implications of the "War Against Terrorism") pp. 9-24, in: *German Yearbook of International Law*, Vol. 44 (2001), Berlin: Duncker & Humblot, 828 pages, ISBN 3-428-108977-9

Dinstein, Yoram (2001), *War, aggression and self-defence*, 3rd ed., Cambridge: Cambridge University Press, 2001, 300 pages, ISBN 0-521-79758-6

Duffy, Helen (2001), *Responding to September 11: The Framework of International Law*, October 2001, <http://www.interights.org>, visited 11 March 2003

Dupuy, Pierre-Marie (2001), *The Law after the Destruction of the Towers*, http://www.ejil.org/forum_WTC, visited 4 February 2003

Feinstein, Barry A. (1985), *The Legality of the Use of Armed Force by Israel in Lebanon – June 1982*, pp. 362-396, in: *Israel Law Review*, Vol. 20 (1985)

Fleischer, Carl A. (2000), *Folkerett [International Law]*, 7th ed., Oslo: Universitetsforlaget, 2000, 370 pages, ISBN 82-00-45285-9

Fouda, Yosri (2002), *Masterminds of Terror: The Truth Behind the Most Devasting Terrorist Attack the World Has Ever Seen*, Arcade Publishing, 2002, ISBN 1559707089

Franck, Thomas M. (2001a), *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, pp. 51-68, in: *Washington University Journal of Law & Policy*, Vol. 5 (2001)

Franck, Thomas M. (2001b), *Terrorism and the Right of Self-Defense*, pp. 839-843, in: *American Journal of International Law*, Vol. 95 (2001)

Gaja, Giorgio (2001), *In What Sense was There an “Armed Attack”?* http://www.ejil.org/forum_WTC, visited 4 February 2003

Gardam, J. G. (1993), *Proportionality and Force in International Law*, pp. 391-413, in: *American Journal of International Law*, Vol. 87 (1993)

Gill, Terry D. (1988), *The Law of Armed Attack in the Context of the Nicaragua Case*, pp. 30-58, in: *Hague Yearbook of International Law*, Vol. 1 (1988), Dordrecht: Martinus Nijhoff Publishers, 471 pages, ISBN 90-247-3749-4

Goodrich, Leland M., Edvard Hambro and Anne Patricia Simons (1969), *Charter of the United Nations: commentary and documents*, 3rd and rev. ed., New York: Columbia University Press, 1969, 732 pages, ISBN 0-231-03218-8

Greenwood, Christopher (1987), International Law and The United States' Air Operation Against Libya, pp. 933-960, in: *West Virginia Law Review*, Vol. 89 (1987)

Greenwood, Christopher (2002), International law and the "war against terrorism", pp. 301-317, in: *International Affairs*, Vol. 78 (2002)

Hargrove, John L. (1987), The Nicaragua Judgment and the Future of the Law of Force and Self-Defense, pp. 135-143, in: *American Journal of International Law*, Vol. 81 (1987)

Harpvigen, Kristian Berg and Strand, Arne (2001), Fenomenet Taliban – fra lokalopprør til storpolitikk [The Phenomenon Taliban – from local insurgency to high politics], p. 445, in: *Internasjonal Politikk [International Politics]*, Vol. X (2001)

Harris, D. J. (1998), *Cases and Materials on International Law*, 5th ed., London: Sweet & Maxwell, 1998, 1123 pages, ISBN 0421 53470 2Hb

Hegghammer, Thomas (2002), Al-Qaida etter Afghanistan [Al Qaida in the aftermath of Afghanistan],
<http://www.atlanterhavskomiteen.no/publikasjoner/andre/kortinfo/2002/12-2002.htm>,
visited 21 August 2003

Kwakwa, Edward (1987), South Africa's May 1986 military incursions into neighbouring African states, pp. 421-443, in: *Yale Journal of International Law*, Vol. 12 (1987)

Mégret, Frédéric (2002), "War"? Legal Semantics and the Move to Violence, pp. 361-399, in: *European Journal of International Law*, Vol. 13 (2002)

New Oxford Dictionary of English (1998), ed. by Judy Perseall et. al., Oxford: Oxford University Press, 1998, 2152 pages, ISBN 0-19-860441-6

O'Brien, William V. (1990), Reprisals, Deterrence and Self-Defense in Counterterror Operations, pp. 421-478, in: *Virginia Journal of International Law*, Vol 30 (1990)

Oppenheim, L. F. L., Robert Jennings and Arthur Watts (1992), *Oppenheim's international law*, 9th ed., Harlow: Longman, 1992, ISBN 0-582-50108-3

Paust, Jordan J. (1986), Responding Lawfully to International Terrorism: The Use of Force Abroad, pp. 711-733, in: *Whittier Law Review*, Vol. 8 (1986)

Pellet, Alain (2001), No, This is not War! http://www.ejil.org/forum_WTC, visited 4 February 2003

Rowles, James P. (1986), "Secret Wars," Self-Defense and the Charter – A Reply to Professor Moore, pp. 568-583, in: *American Journal of International Law*, Vol. 80 (1986)

Rostow, Nicholas (1986), Nicaragua and the Law of Self-Defense Revisited, pp. 437-461, in: *Yale Journal of International Law*, Vol. 11 (1986)

Russel, Ruth B. (1958), *A History of the United Nations Charter*, Washington: The Brookings institution, 1958

Ruud, Morten og Geir Ulfstein (2002), *Innføring i folkerett [Introduction to International Law]*, 2nd ed., Oslo: Universitetsforlaget, 2002, 299 pages, ISBN 82-15-00208-0

Schachter, Oscar (1989), Self-Defense and the Rule of Law, pp. 259-277, in: *American Journal of International Law*, Vol. 83 (1989)

Schachter, Oscar (1991), *International Law In Theory and Practice*, Dordrecht: Martinus Nijhoff Publishers, 1991, 431 pages, in: *Developments in international law*: 13, ISBN 0-7923-1024-1

Schachter, Oscar (1993), The Lawful Use of Force by a State Against Terrorists in Another Country, pp. 243-266, in: *Terrorism & Political Violence: Limits & Possibilities Of Legal Control*, ed. by Henry H. Han, New York: Oceana Publications, 1993, 484 pages, ISBN 0-379-00906-4

Scheideman, Sara N. (2000), Standards of Proof in Forcible Responses to Terrorism, pp. 249-282, in: *Syracuse Law Review*, Vol. 50 (2000)

Shaw, Malcolm N. (1997), *International Law*, 4th ed, Cambridge: Cambridge University Press, 1997, 939 pages, ISBN 0-521-59384-0 (ib.), 0-521-57667-9 (h.)

Simma, Bruno (editor) (2002), The Charter of the United Nations: a commentary, in collaboration with Hermann Mosler et al; assistant editors Andreas Paulus, Eleni Chatidou, 2nd ed., Oxford: Oxford University Press, 2002, 1405 pages, ISBN 0-19-925377-3 (ib.)

Spierrmann, Ole (1999), *Moderne folkeret: efter det 20. århundrede [Modern International Law: In the Aftermath of the 20th Century]*, Copenhagen: Jurist- og Økonomforbundets Forlag, 1999, 641 pages, ISBN 87-574-0440-2

Stahn, Carsten (2001), Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say, http://www.ejil.org/forum_WTC, visited 4 February 2003

Travalio, Gregory M. (2000), Terrorism, International Law, and the Use of Military Force, pp. 145-191, in: *Wisconsin International Law Journal*, Vol. 18 (2000)

Ulfstein, Geir (2003), Terrorism and the Use of Force, pp. 153-168, in: *Security Dialogue*, Vol. 34 (2003)

Ulfstein, Geir (2002), Terror og folkerett [Terror and International Law], p. 67, in: *Lov og Rett*, (2002)

Wedgwood, Ruth (1999), Responding to Terrorism: The Strikes Against bin Laden, pp. 559-575, in: *The Yale Journal of International Law*, Vol. 24 (1999)

Zanardi, Pierluigi L. (1986), Indirect Military Aggression, pp. 111-119, in: *The Current Legal Regulation of The Use of Force*, ed. by Antonio Cassese, Dordrecht: Martinus Nijhoff Publishers, 1986, 536 pages, in: *Developments in international law*, ISBN 90-247-3247-6

Wesbury, Brian S. (2002), The Economic Cost of Terrorism, <http://usinfo.state.gov/topical/pol/terror/02091107.htm>, visited 21 February 2003

5.2 Treaties

Statute of the International Court of Justice (1945)

Vienna Convention on Diplomatic Relations (1961)

Vienna Convention (Vienna Convention on the Law of Treaties, 1969)

UN Charter (Charter of the United Nations, 1945)

5.3 International Judgements

5.3.1 International Court of Justice

Corfu Channel case – Corfu Channel Case, ICJ Reports 1949

Nicaragua case – Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1986

Tehran case – United States Diplomatic and Consular Staff in Tehran, ICJ Reports 1980

5.3.2 International Criminal Tribunal for the former Yugoslavia

Tadic case – Appeals Chamber, Prosecutor v. Tadic, 38 International Legal Materials 1999

5.4 United Nations Documents

5.4.1 General Assembly Resolutions

Declaration on Friendly Relations (1970) – the annex to resolution 2625 (XXV) (1970) (Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations)

Declaration on Measures to Eliminate International Terrorism (1994) – the annex to resolution 49/60 (1994) (Measures to Eliminate International Terrorism)

Definition of Aggression (1974) – the annex to resolution 3314 (XXIX) (1974) (Definition of Aggression)

Resolution 56/83 (2001) (Responsibility of States for internationally wrongful acts)

5.4.2 Security Council Resolutions

The resolutions 1189 (1998), 1214 (1998), 1267 (1999), (1269 (1999)), 1333 (2000), 1368 (2001), 1373 (2001) and 1456 (2003)

5.4.3 International Law Commission Documents

ILC Draft (2001) (cf. the ILC Report (2001))

ILC Report (2001) (Report of the International Law Commission, UN General Assembly Official Records, Fifty-sixth session, Supplement No. 10 (A/56/10))

ILC Report (1980) (Report of the Commission to the General Assembly on the work of its thirty-second session (1980), in: *Yearbook of the International Law Commission*, Vol. II, Part Two, 1980, United Nations

5.4.4 Other United Nations Documents

Press Statement by the Security Council President (8 October 2001) (Press Statement on Terrorist Threats by Security Council President, Press Release AFG/152, SC/7167, 8 October 2001)

United Kingdom letter to the SC president (7 October 2001) (Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, Security Council document, 7 October 2001, http://www.ukun.org/xq/asp/SarticleType.17/Article_ID.328/qx/articles_show.htm, visited 4 February 2003)

United States letter to the SC president (7 October 2001) (Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, 7 October 2001, S/2001/946, <http://www.un.int/usa/s-2001-946.htm>, visited 4 February 2003)

5.5 Other Documents

Address to Congress by the President of the United States (20 September 2001) (Address [by the President of the United States, George W. Bush] to a Joint Session of Congress and the American People, United States Capitol, Washington, D.C., 20 September 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>, visited 4 February 2003)

British Intelligence Report (4 October 2001) (Responsibility for the terrorist atrocities in the United States, 4 October 2001, <http://www.number10.gov.uk/output/page3554.asp>, visited 4 February 2003)

Decision by the NATO Council (12 September 2001) (Press Release (2001) 124, 12 September 2001)

Decision by the OEA (21 September 2001) (Decision by the Secretaries of State in Inter-American Treaty of Reciprocal Assistance, OEA/Ser.F/II.24 RC.24/RES.1/01, 21 September 2001, <http://www.oas.org/OASpage/crisis/RC.24e.htm>, visited 4 February 2003)

Statement by NATO Secretary General, Lord Robertson (8 October 2001) (Press Release (2001) 138, 8 October 2001)

Statement by the North Atlantic Council (12 September 2001) (Press Release (2001) 124, 12 September 2001)

United States Government Report: A Chronology (20 December 2001) (The United States and the Global Coalition Against Terrorism, September – December 2001: A Chronology, Bureau of Public Affairs, 20 December 2001, (<http://www.state.gov/r/pa/ho/pubs/fs/5889.htm>, visited 4 February 2003)

United States Government Report on 11 September 2001 (15 August 2002) (September 11, 2001: Basic Facts, United States Department of State, 15 August 2002, <http://usinfo.state.gov/topical/pol/terror/020815basic.htm>, visited 21 February 2003)

United States Government Report on Terrorism (19 December 2001) (The Global War on Terrorism, 19 December 2001, <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html>, visited 4 February 2003)